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MONOPOLIES BY PATENTS.



7.7.97  
Lewis Edmunds Esq. A.C.  
with the author's Compliments.

# MONOPOLIES BY PATENTS

AND THE

## STATUTABLE REMEDIES AVAILABLE TO THE PUBLIC.

BY

J. W. GORDON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

"In all restraints of trade, where nothing more appears, the law presumes them bad, but if the circumstances are set forth, that presumption is excluded and the Court is to judge of those circumstances and determine accordingly."

By PARKER, C.J., in *Mitchel v. Reynolds*, 1 Peere Williams, p. 197.

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1897.

LONDON :

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TO

AN HONOURED FRIEND

AND MASTER CRAFTSMAN IN THE LAW

I dedicate

THIS SHEAF OF GLEANINGS

IN A FIELD WHICH HE HAS MADE

PECULIARLY HIS OWN.

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## PREFACE.

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THE word "monopoly" has come to be in a sense the possession of writers upon political economy and a lawyer at the present day, if he employs the term, does so with some consciousness of borrowing from the vocabulary of a stranger Muse. Under these conditions, naturally enough, it has no very precise legal significance and for that, among other reasons, its adoption for the purpose of the title of this book demands an explanation.

The explanation is that, in the period from which the materials of this book have in the main been drawn, the word was a term of law and had as such a definite and authentic meaning. The phraseology adopted by Lord Blackburn in *Bailey v. Roberton* (3 App. C. p. 1074), especially his use of the word "monopoly," is proof, if proof were needed, that in that sense it is now antiquated, perhaps obsolete. Yet no word has replaced it and in such an exigency as arises upon the choice of a title, when words must needs be numbered no less than weighed, it becomes sometimes necessary to make formidable sacrifices to compendious expression. Such pressure shaped the present title and determined the employment of the word "monopoly" in the now-forgotten sense which it received from the Common lawyers;—a sense in which it connotes the infringement of private rights and stands fulfilled if only a single

individual is ousted from the freedom which he has inherited with the laws of England to follow any lawful trade.

Monopoly in this sense is no less a grievance at the present day than it was in bygone times although the mischief can no longer be traced to the original fountain-head of a misused prerogative. Kings have grown less formidable but private individuals more so since the beginning of the seventeenth century and in the vivid language of Lord Justice Bowen (*a*), the complaint of Mr. Justice Pearson (*b*) and the remonstrance of Sir Bernhard Samuelson (*c*)—to go no farther afield than the following pages for illustration—is to be found argument beyond gainsaying that monopolies are still mischievous to the State and generally inconvenient. That such provisions as the Statute Law comprises for their suppression are almost entirely overlooked at the present time and—incredible as it seems—in the main so completely forgotten as to be for all practical purposes unknown—this is the circumstance which has given occasion for the present book and this its author's apology for putting it forward. The germ of this little treatise lies in Chapter II., which was originally intended to appear in the form of a review article. But the difficulty of writing to purpose upon such a topic under the limitations which that literary form imposes proved insurmountable. It became evident that, having regard to the archaic form of the fourth section of the Statute of Monopolies and to the absence of authorities upon its construction and application, the only treatment that could be attempted with any prospect of useful result was that of commentary;—and a commentary imports a book. The

(*a*) See below, p. 11.

(*b*) See below, p. 152.

(*c*) See below, p. 102.

production of a book in its turn involved the discussion of at least the companion remedy given by section thirty-two of the Patents Act of 1883 and this, in the absence of any text-book which does justice to that section as illustrated by the law reports at the present day, became a motive for a new chapter in the book. The twenty-second section of the Patents Act completes the tale of statutable remedies specifically given for the mischief of monopoly and constitutes, with the enactments already mentioned, a body of Statute Law small indeed in bulk but of vast importance to the industrial community and meriting at least the illustration which comes of separate grouping. This body of law is the subject of the following pages. It is embodied in the second, third and fourth chapters to which the rest stand more or less in the relation of Appendix, being collected to serve the purposes of illustration and reference.

There is in this appended matter one item of which specific mention must be made, namely, the Declaration of King James published in 1610 and now reprinted in *facsimile* from an original preserved in the British Museum. The unusual course of *facsimile* reproduction has been suggested by the extraordinary interest of the document and particularly by the hope that, when someone shall have come forward with the nucleus of a bibliography, librarians and owners who may have prints of the Declaration in their possession or custody may become interested to make communications with the view of perfecting the list of known copies. A document incorporated, as this is, with the Statute Law of the realm should not be left to take its chance upon the second-hand bookstalls even although half a dozen copies be known to be preserved beyond any serious risk of loss or damage in great public libraries.

The best way of calling attention to this matter, and of facilitating the necessary identification of the document, appeared to be the photographic reproduction of the original which has here been undertaken.

In the way of acknowledgment to personal friends and others who have assisted me in the preparation of this book there is much that must be reserved for private communication but I cannot refrain from saying here that I have been greatly indebted for much helpful criticism and valuable suggestion to my friend Mr. A. B. SHAW, of the Inner Temple, nor should I be content to pass over, without the fullest acknowledgment, the great kindness of Prof. S. R. GARDINER in placing at my disposal for publication here (*d*) his comments upon King James' Declaration. Moreover, to the Trustees of the British Museum I desire to tender my best thanks for the courtesy with which they have afforded me facilities for obtaining photographs of the Book of Bounty. My gratitude to them is the greater because the privileges accorded to me were granted in the ordinary course of their literary hospitality and not as matter of especial grace. Nor have I only this for which to thank them and the staff of officers who conduct the business of the library, for it must be added that my search for "the King's Book" would probably have been altogether fruitless if it had not been furthered by the volunteered co-operation of the Superintendent of the Reading Room. My unassisted efforts had already failed elsewhere. The Book lay under my hand, as I now know, in the Library of my own Society of the Middle Temple but escaped my search and was only brought to light a few weeks ago, when I bethought me of consulting

Mr. HUTCHINSON about it. Had I appreciated at first how rich the Middle Temple Library is in documents of its date and class, I should have renewed my search for it there as soon as I had the means of identifying the book and in that case it would have been the most natural course for me to seek permission from the Benchers of the Inn to obtain my photographs from their copy of the Declaration. But the ready courtesy of the Trustees of the British Museum made it so easy to accomplish, with their permission, all that I desired to do that not until a systematic inquiry was put in hand did I find any occasion to look for additional copies of the print. The librarians and others who have assisted me in this systematic inquiry are too many for individual mention and I will presume, therefore, to address to them one comprehensive word of acknowledgment and thanks.

One thing remains to be said; for, in putting the finishing strokes to my work, I have become very conscious of having attempted much and, though sanguine that something has been accomplished, so keenly aware of having failed of accomplishing more that I cannot lay down the pen without adding one word upon that topic. But here I shall avail myself of borrowed language for the sentiment is not new and, with its fit expression running in one's head, quotation affords the only escape from conscious plagiarism. *Quod rei criticæ tractatu huic deesse videatur id mihi intra fines exiguos incluso lector candidus ignoscat.*

J. W. GORDON.

*May, 1897.*



## CONTENTS.



	PAGE
PREFACE.....	vii
ERRATA .....	xiv
TABLE OF ABBREVIATIONS.....	xv
TABLE OF CASES.....	xvii

---

### CHAPTERS.

I. INTRODUCTORY.....	1
II. COMMENTARY ON STATUTE OF MONOPOLIES	21
III. COMMENTARY ON THE 32 <sup>ND</sup> SECTION .....	71
IV. COMMENTARY ON THE 22 <sup>ND</sup> SECTION .....	98
V. COMMENTARY ON THE PATENT.....	106
VI. PROCEDURE .....	133

APPENDIX.....	155
I. BOOK OF BOUNTY .....	157
II. REPORTS OF CASES (MONOPOLIES— PENAL STATUTES)..	193
III. STATUTES, &c. ....	235
IV. ILLUSTRATIVE DOCUMENTS .....	249
V. NOTE UPON <i>REX v. MUSSARY</i> .....	268



## ERRATA.

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Page 46, n. (*u*). The reference in this note to Myl. & Cr. is given on the authority of Mr. Norman who, however, is clearly mistaken and should have cited 1 Russ. & Myl. 166.

Page 56, n. (*o*). The reference to *Salt v. Cooper* should be 16 Ch. D. 549.

Page 64, n. (*i*). The case cited as *Nurse v. Geeling* should read *Nurse v. Geeting* and *Wigley v. Thomas* should be *Wigley v. Tomlins*.



# LIST OF ABBREVIATIONS.

NOTE.—It has not been possible to maintain rigorous uniformity in the system of abbreviating followed in this book, because many of the citations occur in old authorities which have been textually reproduced and in which abbreviations now obsolete are adopted.

Acts, P. C. {	Acts of the Privy Council of England	D. C. P. . .	Daniel's Chancery Practice
Ad. & E... {	Adolphus and Ellis	De G. & Sm. .... }	De Gex and Smale
Andr. ....	Andrews' Reports	De G. F. {	De Gex, Fisher, and Jones
App. C. . . }	Law Reports; Appeal Cases	& J. .... }	
App. Cas. . }		Deut. ....	Deuteronomy
Arch. .... {	Archæologia (Soc. of Anti-quaries)	D'Ewes .. {	D'Ewes' Journals of the Parliaments of Queen Elizabeth
Ass. ....	Liber Assisarum	D. & L. . .	Dowling and Lowndes
Bac. Ab... {	Bacon's Abridgment	Doug. ....	Douglas' Reports
B. & Ald.. {	Barnewell and Alderson	Dowl. P. C. {	Dowling's Practice Cases, Old Series
B. & C. . . }	Barnewell and Cresswell	Dowl. & Ry. {	Dowling and Rylands
B. & S. . . }	Best and Smith	Dyer ....	Dyer's Reports
Bing. ....	Bingham	East. ....	East's Reports
Bl. Com... {	Blackstone's Commentaries, 15th Edition (1809)	Eliz. Dyer.	Dyer's Reports temp. Eliz.
Br. Ab. . .	Brooke's Abridgment	Eq. ....	Law Reports, Equity Cases
Bro. Ent. .	Brown's Entries	Ex. Div... {	Law Reports, Exchequer Division
Bull. N. P.	Buller's Nisi Prius	F. N. B... {	Fitzherbert's Natura Brevium
Bulst. ....	Bulstrode's Reports	Giff. ....	Giffard's Reports
Burr. ....	Burrows' Reports	Godb. ....	Godbolt's Reports
Carth. ....	Carthew's Reports	Goodeve . .	Goodeve's Patent Cases
C. B. .... {	Common Bench (Scott's) Reports	Griff. ....	Griffin's Patent Cases
C. B. N. S. {	Common Bench, New Series	2 Griff. . . {	Griffin's Pat. Cases decided by Comp. Gen. and L. O. in 1887
C. D. .... {	Law Reports, Chancery Division	H. & C. . .	Hurlstone and Coltman
Ch. .... {	Law Reports, Chancery Appeal Cases	Hare ....	Hare's Reports
( ) Ch... {	Law Reports, Chancery (since 1890)	Har. & W.	Harrison and Wollaston
Ch. D.... {	Law Reports, Chancery Division	Harg. St. {	Hargrave's State Trials, 8vo. ed. by Howell
Close Roll. {	Rotuli Literarum Clausarum (Hardy)	Tr. .... }	
C. M. & R. {	Crompton, Meeson and Roscoe	H. Bl. ....	Henry Blackstone's Reports
Cod. Just..	Codex Justiniani	H. C. Jl... {	House of Commons Journal
Co. Litt... {	Coke upon Littleton	Herbert .. {	Herbert's History of the London Livery Companies
Comb. ....	Comberbach	Hindmarch {	Hindmarch's Law relating to Patent Privileges
Com. Dig.	Comyn's Digest	H. L. C... {	House of Lords Cases (Clark and Finelly; Clark)
Commen- {	Plowden's Commentaries (or Reports)	H. L. Cas.. {	
taries .. }		Inst. ....	Coke's Institutes
Co. Rep... {	Coke's Reports	J. A. ....	Judicature Act
Coryton .. {	Coryton's Law of Letters Patent (1855)	Jur. N. S..	Jurist Reports, New Series
Cowp. ....	Cowper's Reports	Keb. ....	Keble's Reports
Cro. Eliz. .	Croke's Reports temp. Eliz.	Kennett .. {	Kennett's History of England, 2nd ed.

Lawson ..	{ Lawson's Patents, Designs and Trade Marks Acts	Pri. ....	Price's Reports
Ld. Raym.	Lord Raymond's Reports	P. Wms...	Peere Williams
Leon. ....	Leonard's Reports	Q. B. ....	{ Queen's Bench Cases, Adol- phus and Ellis
Lev.....	Levinz's Reports	( ) Q. B.	{ Law Reports, Queen's Bench Division (since 1890)
Ley. ....	Ley's Reports	Q. B. D...	{ Law Reports, Queen's Bench Division
Lib. Ass...	Liber Assisarum	Raym. ..	Sir T. Raymond's Reports
L. J. Bk...	Law Journal, Bankruptcy	Register ..	Registrum Brevium
L. J. Ch...	Law Journal, Chancery	Rem. ....	{ Remembrancia of City of London, Overall's Analy- tical Index to
L. J. C. P.	Law Journal, Common Pleas	Rememb. .	{
L. J. Ex..	Law Journal, Exchequer	Roll. Ab. .	Rolle's Abridgment
L. J. M. C.	{ Law Journal, Magistrates' Cases	Roll. Rep.	Rolle's Reports
L. J. Q. B.	Law Journal, Queen's Bench	Rot. Par. .	Parliament Roll
L. R. Eq..	Law Reports, Equity Cases	Rot. Pat..	Patent Roll
L. R. Ex..	{ Law Reports, Exchequer Cases	R. P. C. . .	{ Reports of Patent Cases (Cutler)
L. R. Ir...	Irish Law Reports	R. R. ....	Revised Reports
L. R. Q. B.	{ Law Reports, Queen's Bench Cases	R. S. C. ..	Rules of the Supreme Court
L. T. ....	Law Times Reports	Russ. & ..	{ Russell and Mylne
L. T. N. S.	Law Times, New Series	Myl. ....	
Macqueen }	Macqueen's Scotch Appeals	Ry. & M.	Ryan and Moody
Sc. App.		Ry. Fœd..	Rymer's Fœdera
Macr. ....	Macrory's Patent Cases	Salk. ....	Salkeld's Reports
Macr. P. C.		Sav.....	Savile's Reports
Mag. Car..	Magna Carta	Skin. ....	{ Skinner's Reports
M. & G. ..	Manning and Grainger	Skinner ..	
M. & P. ..	Moore and Payne	S. L. R. ..	Statute Law Revision Acts
M. & W...	Meeson & Welsby	St. Pap. }	State Papers, Domestic
M'Clel. ..	M'Cleland	Dom. .. }	Series
Mer. ....	Merivale	Taunt. ..	Taunton's Reports
Mod. ....	Modern Reports	Thess.....	{ Thessalonians (St. Paul's Epistle to)
Moore ....	{ Moore's Reports in Common Pleas and Exchequer Divi- sions	Times Rep.	Times Law Reports
Moore K.		T. R. ....	Term Reports
B. ....	Sir Fras. Moore's Reports	Tyr. ....	Tyrwhitt's Reports
Myl. & Cr.	Mylne and Craig	Ventr....	Ventris' Reports
Nev. & M..	Neville and Manning	Ves. ....	Vesey's Reports
New Reps.	New Reports	Vin. Ab...	Viner's Abridgment
Noy .....	Noy's Reports	W. Bl. ..	{ Sir William Blackstone's Reports
Odgers ..	{ Odgers' Principles of Plead- ings, 2nd ed.	Wils. ....	Serjeant Wilson's Reports
Parl. Hist.	{ Parliamentary History of England	Wms. ....	Saunders' Reports, by Serj. Williams
Pat. Act...	Patent Act of 1883	W. N.....	Weekly Notes
Pat. Sc. }	{ Paton's Appeal Cases from Scotland	W. P. C...	Webster's Patent Cases
App. ....		W. R. ....	Weekly Reporter
P. D. ....	{ Law Reports, Probate Divi- sion	Y. B. ....	{ Year Book. (The citations sometimes give the folio only, at other times the placitum referred to)
Plowd. ..	{ Plowden's Reports (or Com- mentaries)	Yelv. ....	Yelverton
P. R. ....	Patents Rules, 1890		

## TABLE OF CASES.

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Alcock v. Cooke</b> .....	1829	5 Bing. 340 ; 7 L. J. C. P. 126 ; 2 M. & P. 625 ; 1 W. P. C. 41, n.	Construction.... Recitals .....	114 107
<i>Allen, Darcy v.</i> .....	....	(See <i>Monopolies, Case of</i> .)		
<i>Allen, Huffer v.</i> .....	....	(See <i>Huffer v. Allen</i> .)		
<b>Alton Woods, Case of</b>	1600	1 Co. Rep. 40 b .....	Aid Prayer .... Bounty ..... Certain know- ledge. Construction.... Recitals .....	61 110 111, 112 110, 114, 116, 120 109
<i>Andover, Reg. v. JJ. of</i>	....	(See <i>Reg. v. JJ. of Andover</i> .)		
<i>Anglo-American Brush Corporation, King, Brown &amp; Co. v.</i>	....	(See <i>King, Brown &amp; Co. v. Anglo-American Brush Corporation</i> .)		
<i>Ashworth, Law v.</i> .....	....	(See <i>Law v. Ashworth</i> .)		
<b>A.-G. v. Constable</b> ..	1879	4 Ex. Div. 174 ; 48 L. J. Ex. 455.	Restraint .....	35
<b>A.-G. v. Sir E. Farnen</b>	1676	2 Lev. 172.....	Recitals .....	109
<b>A.-G. v. Hatton</b> ....	1824	13 Pri. 477 ; M'Clel. 216	Damages .....	57
<b>A.-G. v. Sir E. Turner</b>	1676	2 Mod. 107.....	Recitals .....	109
<b>Auditor King's Case</b> ..	....	8 Co. Rep. 56 b. ....	Construction....	114, 120
<i>Austin, Waltham v.</i> ..	....	(See <i>Waltham v. Austin</i> .)		
<i>Automatic Machine Co., Combined Weighing &amp; Advertising Co. v.</i>	....	(See <i>Combined Weighing &amp; Advertising Co. v. Automatic Machine Co.</i> )		

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Automatic Weighing Mac. Co. v. Knight</b>	1889	6 R. P. C. 307 .....	Procedure .....	150
<b>Badische Anilin v. Levinstein.</b>	1883	24 Ch. D. 175 .....	Forfeiture .....	49
			Licenses .....	103
			22nd section ....	152
<b>Bailey v. Robertson ..</b>	1878	3 App. C. 1075.....	Validity .....	108, 109
<b>Bainbridge v. Wigley</b>	1810	Goodeve, 30 .....	Patent Grant ...	108
<b>Barnett and Foster v. Barrett's, &amp;c. Co. Ld.</b>	1884	1 R. P. C. 9 .....	Injunction .....	86, 88
			Patentee .....	77
			Threats .....	82
<b>Barney v. U. T. Co. ..</b>	1885	28 Ch. D. 397; 52 L. T. 573.	Injunction .....	86
<b>Barrett and Elers, Ld. v. Day.</b>	1890	43 Ch. D. 435; 59 L. J. Ch. 464; 7 R. P. C. 58; 62 L. T. 597.	Agency .....	77
			Grievance .....	85, 94
			Injunction .....	80, 89
			Ouster of 32nd section.	94
			Procedure .....	97, 149
			Threats .....	71, 81, 84
			Threats action ..	135
<i>Barrett's, &amp;c. Co. Ld., Barnett and Foster v.</i>	....	(See <i>Barnett and Foster v. Barrett's, &amp;c. Co. Ld.</i> )		
<i>Bateman, Walton v. ..</i>	....	(See <i>Walton v. Bateman.</i> )		
<b>Bedell v. Russell ....</b>	1825	Ry. & M. 294; 27 R. R. 750.	Procedure .....	93, 137
<b>Betts v. De Vitre ....</b>	1864	34 L. J. Ch. 291; 12 L. T. N. S. 51; 11 Jur. N. S. 217.	Forfeiture .....	47, 48
<b>Betts v. Wilmott ....</b>	1877	6 Ch. 239 .....	Licensees .....	123, 128, 131
			Sole privilege ..	122
<i>Beverley, Crossley v. ..</i>	....	(See <i>Crossley v. Beverley.</i> )		
<i>Bewes, Buckle v. ....</i>	....	(See <i>Buckle v. Bewes.</i> )		
<b>Blair v. Eisler .....</b>	1888	21 Q. B. D. 185; 57 L. J. Q. B. 512; 59 L. T. 337.	Privilege .....	63
<b>Blake's Case .....</b>	1605	6 Co. Rep. 44 .....	Writ of Attaint..	65
<b>Bones v. Booth .....</b>	1778	2 Wm. Bl. 1226 .....	Penal Statute ..	56
<i>Booth, Bones v. ....</i>	....	(See <i>Bones v. Booth.</i> )		
<b>Boulton v. Bull .....</b>	1795	2 H. Bl. p. 463; 3 R. R. 439.	Monopoly .....	27
<i>Boursier, Elmslie v. ..</i>	....	(See <i>Elmslie v. Boursier.</i> )		
<i>Bousfield, Fife v. ....</i>	....	(See <i>Fife v. Bousfield.</i> )		

## TABLE OF CASES.

xix

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Bower v. Hodges</b> ....	1853	13 C. B. 765; 22 L. J. C. P. 198.	Licensees .....	131
<b>Boyce v. Whitaker</b> ..	1779	1 Doug. 97 .....	Pleading .....	139
<b>Bozoun's Case</b> .....	1584	4 Co. Rep. 34 .....	Validity.....	274
<b>Brauer v. Sharp</b> ....	1886	3 R. P. C. 197 .....	Common Law ..	74
			Grievance .....	94
			Injunction ....	80
			Procedure .....	97
<i>Bray, Sugg v.</i> .....	....	(See <i>Sugg v. Bray.</i> )		
<b>Brewster v. Weld</b> ....	1703	6 Mod. 229 .....	<i>Sci. fa.</i> .....	118
<i>Brotherhood, Halsey v.</i> ....	....	(See <i>Halsey v. Brotherhood.</i> )		
<b>Brown's Patent, In the Matter of.</b>	1887	2 Griff. 1 .....	Patent Grant ..	108
<b>Brunton v. Hawkes</b> ..	1821	4 B. & Ald. 541; 23 R. R. 382.	Bounty .....	110
<i>Bryant &amp; May, Fusee Vesta Co. v.</i> ....	....	(See <i>Fusee Vesta Co. v. Bryant &amp; May.</i> )	Validity.....	109
<b>Buckle v. Bewes</b> ....	1825	4 B. & C. 154 .....	Damages .....	57
<b>Buckler's Case</b> .....	1598	2 Co. Rep. 55 .....	Grant.....	116
<i>Bull, Boulton v.</i> .....	....	(See <i>Boulton v. Bull.</i> )		
<i>Burn, Overton v.</i> ....	....	(See <i>Overton v. Burn.</i> )		
<b>Burt v. Morgan &amp; Co.</b>	1887	4 R. P. C. 281 .....	Injunction ....	80
			Threats .....	78, 80
<b>Butler's Case, Sir Oliver.</b>	1680	2 Vent. 344 .....	<i>Sci. fa.</i> .....	118
<b>Butler &amp; Baker's Case</b>	1591	3 Co. Rep. 33 .....	Certain know-ledge.	111
<b>Cadell v. Robertson</b> ..	1811	5 Pat. Sc. Ap. 503 .....	Injunction ....	134
<b>Caldwell v. Van Vlis-sengen.</b>	1881	9 Hare, 415; 21 L. J. Ch. 97; Goodeve.	Bounty .....	111
			Construction....	114
			Grant.....	116, 126
			Patent Grant ..	106
			Penal Statute ..	53, 54
<b>Caledonian Rail. Co. v. North British Rail. Co.</b>	1881	6 App. C. 121 .....		
<i>Carnan, Stationers' Co. v.</i> ....	....	(See <i>Stationers' Co. v. Carnan.</i> )		
<i>Castle Mail Packet Co., In re Payne.</i>	....	(See <i>Payne, In re, Ex parte Castle Mail Packet Co.</i> )		

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Challender v. Royle.</b>	1887	4 R. P. C. 364, 376; 36 Ch. D. 425; 56 L. J. Ch. 995.	Common law .. Diligence ..... Grievance ..... Injunction.....	74 95 85, 94 86, 87, 88, 89, 93
			Ouster of 32nd section. 32nd section .... Threats .....	94, 95 71, 76 78, 79, 80, 81, 83, 84
			Threats action ..	91
<b>Chandos' Case (Duke of).</b>	1606	6 Co. Rep. 56 a .....	Construction....	272
<b>Chanter v. Dewhurst.</b>	1844	12 M. & W. 823; 13 L. J. Ex. 198; Goodeve.	Construction....	132
<b>Chanter v. Johnson ..</b>	1845	14 M. & W. 408; 14 L. J. Ex. 289; Goodeve.	Licencees ..... Licencees .....	131 128, 131
<b>Chester v. Frieland ..</b>	....	Ley, 73 .....	Validity.....	108
<i>Chester, Rex v. ....</i>	....	(See <i>Rex v. Chester.</i> )		
<b>Cholmley's Case ....</b>	1598	2 Co. Rep. 54 .....	Recitals.....	109
<i>Church Eng. Co. Ltd., Wilson v. Walter, E.</i>	....	(See <i>Wilson v. W. E. Church Eng. Co. Ltd.</i> )		
<i>Clarke, Lee v.....</i>	....	(See <i>Lee v. Clarke.</i> )		
<i>Clarke, Tasmanian Co. v.</i>	....	(See <i>Tasmanian Co. v. Clarke.</i> )		
<i>Clarke, Walker v. ....</i>	....	(See <i>Walker v. Clarke.</i> )		
<i>Coffin, Hunt v. ....</i>	....	(See <i>Hunt v. Coffin.</i> )		
<i>Cogan, Hyde v. ....</i>	....	(See <i>Hyde v. Cogan.</i> )		
<b>Colley v. Hart (Interlocutory).</b>	1889	6 R. P. C. 20 .....	Injunction ....	87, 88, 89
<b>Colley v. Hart (Trial).</b>	1890	44 Ch. D. 179; 59 L. J. Ch. 308; 62 L. T. 424; 7 R. P. C. 101.	Procedure ..... Diligence ..... Injunction .... Ouster of 32nd section. Procedure ..... Threats .....	97 95, 96 88, 134 95 97 82
<i>Colley, Wilkinson v. ..</i>	....	(See <i>Wilkinson v. Colley.</i> )		



Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Combined Weighing &amp; Advertising Co. v. Automatic Machine Co.</b>	1889	42 Ch. D. 666; 58 L. J. Ch. 709; 61 L. T. 474, 536; 6 R. P. C. 502.	Agency ..... Diligence ..... Ouster of 32nd section. Pleading ..... 32nd section .... Threats ..... Threats action ..	77 90, 95, 96 95 97 76 17, 82 76
<i>Constable, A.-G. v. . . . .</i>	....	(See <i>A.-G. v. Constable.</i> )		
<i>Cooke, Alcock v. . . . .</i>	....	(See <i>Alcock v. Cooke.</i> )		
<i>Cooper, Salt v. . . . .</i>	....	(See <i>Salt v. Cooper.</i> )		
<b>Cooper v. Whittingham.</b>	1880	15 Ch. D. 501; 49 L. J. Ch. 752.	Injunction ....	133
<i>Corker, Kingston v. . . . .</i>	....	(See <i>Kingston v. Corker.</i> )		
<i>Cowley, Russell v. . . . .</i>	....	(See <i>Russell v. Cowley.</i> )		
<b>Crampton v. Pat. Invest. Co. Ltd.</b>	1888	5 R. P. C. 393 .....	Certificate of Validity. Diligence ..... Procedure ..... Threats ..... Subject Matter..	93, 145 96 93, 136 76, 78 219
<b>Crane v. Price . . . . .</b>	1842	4 M. & G. 605; 1 W. P. C. 411; 12 L. J. C. P. 81.		
<b>Crossley v. Beverley..</b>	1829	1 Russ. & Myl. 166; 1 W. P. C. 119; Goodeve.	Forfeiture .....	45, 46
<b>Crossley v. Derby Gas Co.</b>	1829	1 Russ. & Myl. 166; 4 L. J. Ch. 25; 1 W. P. C. 119; Goodeve.	Forfeiture .....	46
<b>Crossley v. Dixon ....</b>	1863	10 H. L. Cas. 293; 32 L. J. Ch. 617; 9 Jur. N. S. 607; Goodeve.	Licensees .....	128, 131
<i>Darcy v. Allen . . . . .</i>	....	(See <i>Monopolies, Case of.</i> )		
<b>Davenport v. Hurdis..</b>	1599	Moore, K. B. 576; 11 Co. Rep. 86; App. II. p. 226.	Monopoly .....	26
<i>Day, Barrett and Elers, Ltd. v. . . . .</i>	....	(See <i>Barrett and Elers, Ltd. v. Day.</i> )		
<b>Day v. Foster . . . . .</b>	1890	43 Ch. D. 435; 59 L. J. Ch. 464; 62 L. T. 597; 7 R. P. C. 58.	Injunction .... Procedure .....	134 97

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Day v. Ward</b> .....	1886	17 Q. B. D. 704; 55 L. J. Q. B. 494; 55 L. T. 518.	Privilege .....	63
<i>Derby Gas Co., Crossley v.</i>	....	(See <i>Crossley v. Derby Gas Co.</i> )		
<i>De Vitre, Betts v.</i> ..	....	(See <i>Betts v. De Vitre.</i> )		
<i>Dewhurst, Chanter v.</i> ..	....	(See <i>Chanter v. Dewhurst.</i> )		
<b>Dick v. Haslam</b> .....	1891	8 R. P. C. 197 .....	Injunction ....	90
<b>Dillon, Ex parte</b> ....	1879	11 Ch. D. 56.....	Grievance .....	42
<i>Dixon, Crossley v.</i> ....	....	(See <i>Crossley v. Dixon.</i> )		
<b>Douglass v. Pintsch</b> ..	1896	65 L. J. Ch. 920; 13 R. P. C. 60, 673.	Injunction ....	87, 89
<b>Dowson, Taylor &amp; Co. v. The Drosophore Co., Ltd.</b>	1894	11 R. P. C. 536; 12 R. P. C. 96.	Threats .....	82
			Agency .....	77
			Ouster of 32nd section.	95, 97
			Procedure .....	92
			Threats .....	82
<b>Dredge v. Parnell</b> ....	1896	13 R. P. C. 394 .....	Common Law ..	74
<b>Driffield, &amp;c. Co. v. Waterloo, &amp;c. Co.</b>	1886	31 Ch. D. 638; 55 L. J. Ch. 391; 54 L. T. 210; 3 R. P. C. 46.	Injunction ....	89
			Agency .....	77
			Damages .....	91
			Grievance .....	85
			Injunction ....	80
			32nd section ....	76
			Threats .....	82, 135
<i>Drosophore Co., Dowson, Taylor &amp; Co. v. The.</i>	....	(See <i>Dowson, Taylor &amp; Co. v. The Drosophore Co., Ltd.</i> )		
<b>Dudgeon v. Thomson and another.</b>	1878	3 App. Cas. 44.....	Penal Statute ..	54
<i>Duke of Chandos' Case.</i>	....	(See <i>Chandos Case, Duke of.</i> )		
<i>Earl of Rutland's Case</i>	....	(See <i>Rutland's Case, Earl of.</i> )		
<i>Earl of Shrewsbury's Case.</i>	....	(See <i>Shrewsbury's Case, Earl of.</i> )		
<i>Earl Spencer v. Swannell.</i>	....	(See <i>Spencer, Earl v. Swannell.</i> )		
<b>East India Co. v. Sandys.</b>	1685	Skinner, 223.....	Foreign trade ..	29
<i>E. Lond. Water W. Co., Hayward v.</i>	....	(See <i>Hayward v. E. L. Water W. Co.</i> )		



Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Eden v. Weardale Iron &amp; Coal Co.</b>	1887	34 Ch. D. 224; 35 Ch. D. 287; 56 L. J. Ch. 400; 55 L. T. 860.	Aid Prayer ....	61
<i>Edge, Johnson v. ....</i>	....	(See <i>Johnson v. Edge.</i> )		
<b>Edlin v. Pneumatic Tyre Co.</b>	1893	10 R. P. C. 312.	Injunction .... Pleading ..... Threats .....	86, 88 97 82
<i>Eisler, Blair v. ....</i>	....	(See <i>Blair v. Eisler.</i> )		
<i>Elec. Power St. Co., Union E. &amp;c. Co. v.</i>	....	(See <i>Union Elec. Co. v. E. P. S. Co.</i> )		
<b>Elmslie v. Boursier ..</b>	1870	9 Eq. 222; 39 L. J. Ch. 328.	Construction.... Grant.....	115 116, 125, 126
<b>Emma Silver Mining Co. v. Grant.</b>	1879	11 Ch. D. 930; 40 L. T. 804.	Patent Grant .. Procedure .....	106 146, 147
<b>Emperor of Austria v. Kossuth.</b>	1861	2 Giff. 628; and on appeal, 3 De G. F. & J. 217; 7 Jur. N. S. 639; 30 L. J. Ch. 690; 4 L. T. N. S. 274, 494.	Forfeiture.....	47
<b>English &amp; American Machinery Co., Limited v. Gare Machinery Co., Limited.</b>	1894	11 R. P. C. 628 .....	Common law .. Grievance .... Injunction .... Ouster of 32nd section. Threats .....	74 94 80 95 82
<i>Eve, Hall v. ....</i>	....	(See <i>Hall v. Eve.</i> )		
<i>Fairburn &amp; Hall, Household and Rosher v.</i>	....	(See <i>Household &amp; Rosher v. Fairburn &amp; Hall.</i> )		
<i>Farmen, Sir E., A.-G. v.</i>	....	(See <i>A.-G. v. Sir E. Farmen.</i> )		
<b>Feather v. Reg. ....</b>	1865	6 B. & S. 283; 35 L. J. Q. B. 200; 12 L. T. N. S. 114; Goodeve.	Bounty..... Certain knowledge. Patent Grant ..	107 111 106
<b>Fife v. Bousfield ....</b>	1844	6 Q. B. 100; 2 D. & L. 481; 13 L. J. Q. B. 306; 8 Jur. 734.	Penal Statute .. Pleading .....	52, 56 142
<i>Foster, Day v. ....</i>	....	(See <i>Day v. Foster.</i> )		
<b>Frearson v. Loe ....</b>	1878	9 Ch. D. 67 .....	Forfeiture ....	49
<i>Frieland, Chester v. ..</i>	....	(See <i>Chester v. Frieland.</i> )		

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
Fullwood <i>v.</i> Fullwood	1878	9 Ch. D. 179; 47 L. J. Ch. 459; 38 L. T. N. S. 380.	Injunction ....	89
Fusee Vesta Co. <i>v.</i> Bryant and May.	1887	4 R. P. C. 193.....	Corporation .... Injunction.....	76 80, 88, 90, 93
<i>Gardiner, Lord Huntingtower v.</i>	....	(See <i>Huntingtower v. Gardiner.</i> )	Threats .....	81
<i>Gare Machinery Co. Ld., E. and A. Machinery Co. Ld. v.</i>	....	(See <i>Eng. and Amer. M. Co. Ld. v. Gare Machinery Co. Ld.</i> )		
Garrett <i>v.</i> J.J. of Marylebone.	1884	12 Q. B. D. 620 .....	Grievance .....	42
Gaulard and Gibbs <i>v.</i> Lindsay.	1887	4 R. P. C. 190. ....	Injunction.....	80
<i>Geeting or Gething, Nurse v.</i>	....	(See <i>Nurse v. Geeting.</i> )		
<i>Gibson, Reeve v.</i> .....	....	(See <i>Reeve v. Gibson.</i> )		
<i>Gilford, Pattison v.</i> ..	....	(See <i>Pattison v. Gilford.</i> )		
<i>Graham, Milne v.</i> ....	....	(See <i>Milne v. Graham.</i> )		
<i>Grant, Emma Silver M. Co. v.</i>	....	(See <i>Emma S. M. Co. v. Grant.</i> )		
Great Australian G. M. Co. <i>v.</i> Martin.	1877	5 Ch. D. 10; 46 L. J. Ch. 289; 35 L. T. 874.	High Court ....	56
<i>G. N. Rail., N. L. Rail. v.</i>	....	(See <i>N. L. Rail. v. G. N. Rail.</i> )		
Grey <i>v.</i> Pearson.....	1857	6 H. L. C. 106.....	Penal Statute ..	53
Hall and Others, <i>In the Matter.</i>	1888	5 R. P. C. 307 .....	Amendment ....	97
Hall <i>v.</i> Eve .....	1877	4 Ch. D. 341; 46 L. J. Ch. 145; 35 L. T. N. S. 927.	Procedure .....	92
Halsey <i>v.</i> Brotherhood	1880-1882	15 Ch. D. 514 (C. A.); 19 Ch. D. 386; 49 L. J. Ch. 786.	<i>Bona fides</i> ..... Common law .. Threats .....	39 14, 75 71, 72, 73, 74
<i>Hamilton, Kendall v.</i> ...	....	(See <i>Kendall v. Hamilton.</i> )		
<i>Harford, Neilson v.</i> ..	....	(See <i>Neilson v. Harford.</i> )		

## TABLE OF CASES.

XXV

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<i>Hargreaves, Nuttall v.</i> ....	....	(See <i>Nuttall v. Hargreaves.</i> )		
<b>Harmer v. Plane</b> ....	1807	14 Vesey, jun., 130.....	Bounty .....	107
<b>Hart v. Colley</b> .....	1890	44 Ch. D. 193 .....	Procedure .....	97
<i>Hart, Colley v.</i> .....	....	(See <i>Colley v. Hart.</i> )		
<b>Hasker v. Wood</b> ....	1885	54 L. J. Q. B. 419 .....	Double Costs ..	58
<i>Haslam, Dick v.</i> ....	....	(See <i>Dick v. Haslam.</i> )		
<b>Hassall v. Wright</b> ..	1870	10 Eq. 509; 40 L. J. Ch. 145; Goodeve.	Licensees .....	131
<i>Hawkes, Brunton v.</i> ..	....	(See <i>Brunton v. Hawkes.</i> )		
<b>Hay v. Lord Provost of Perth.</b>	1863	4 Macqueen, Sc. App. 544.	Penal Statute ..	54
<i>Haygrove, Smith v.</i> ..	....	(See <i>Smith v. Haygrove.</i> )		
<b>Hayward v. E. London Water W. Co.</b>	1885	28 Ch. D. 138; 54 L. J. Ch. 523.	Injunction ....	133
<b>Herrburger v. Squire</b>	1888	5 R. P. C. 581 .....	Declaration of invalidity.	94
			Diligence .....	96
			Ouster of 32nd section.	95
			Pleading .....	52, 96, 97, 142
			Threats .....	82
<b>Heydon's Case</b> .....	1585	3 Co. Rep. 7b.....	Remedial Stat...	52
<i>Heydon, Leicester v.</i> ..	....	(See <i>Leicester v. Heydon.</i> )		
<b>Hill v. Evans</b> .....	1862	4 De G. F. & J. 309; 31 L. J. Ch. 457.	Forfeiture .....	48
<b>Hill v. Thompson</b> ....	1818	8 Taunt. 375; 2 Moore, 424; 20 R. R. 488; 1 W. P. C. 239.	Infringement ..	128
			Validity.....	108
<i>Hodges, Bower v.</i> ....	....	(See <i>Bower v. Hodges.</i> )		
<i>Holdsworth, MacRae v.</i> ....	....	(See <i>MacRae v. Holdsworth.</i> )		
<i>Holliday, Watson v.</i> ..	....	(See <i>Watson v. Holliday.</i> )		
<b>Holmes v. L. &amp; N. W. R.</b>	1852	Macr. 22 .....	Grant.....	116, 123
<b>Horne v. Ivy</b> .....	1669	1 Sid. 441; 1 Vent. 47 ..	Forfeiture .....	45

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
Household & Rosher v. Fairburn & Hall.	1884	51 L. T. N. S. 498; 1 R. P. C. 114; 2 R. P. C. 142.	Injunction .....	74
Howarth, Sykes v. ....	....	(See <i>Sykes v. Howarth</i> .)		
Huffer v. Allen .....	1867	L. R. 2 Ex. 18; 36 L. J. Ex. 17; 4 H. & C. 634; 15 L. T. N. S. 225; 12 Jur. N. S. 930.	Seizure of Goods	57
Hunt v. Coffin .....	1561	Dyer, 197 b. ....	Sci. fa. ....	118
Hunt, Pinney v. ....	....	(See <i>Pinney v. Hunt</i> .)		
Hunt, Thomas v. ....	....	(See <i>Thomas v. Hunt</i> .)		
Huntingtower, Lord, v. Gardiner.	1823	1 B. & C. 299; 2 Dowl. & Ry. 457; 1 L. J. (O. S.) K. B. 120.	Penal Statute ..	52
Hurdis, Davenant v. ....	....	(See <i>Davenant v. Hurdis</i> .)		
Hyde v. Cogan .....	1781	Doug. 705 .....	Penal Statute ..	52
Igulden, Wells v. ....	....	(See <i>Wells v. Igulden</i> .)		
Ipswich, Case of Clothiers of.	....	(See <i>Ipswich Taylors' Case</i> .)		
Ipswich Taylors' Case	1614	11 Co. Rep. 53; Godb. 253.	Common law ..	26
Isaacson v. Thompson	1871	41 L. J. Ch. 101 .....	Validity .....	117
Ivy, Horne v. ....	....	(See <i>Horne v. Ivy</i> .)	Injunction ....	88
John, the Dyer, Case of.	1414	Y. B. 2 H. V. 5 B.; 11 Co. Rep. 53.	Monopoly ....	26, 27
Johnson, Chanter v. ...	....	(See <i>Chanter v. Johnson</i> .)		
Johnson v. Edge ....	1892	(1892) 2 Ch. 2; 61 L. J. Ch. 262; 66 L. T. 44.	Patentee .....	78
Johnson, Needham v. ...	....	(See <i>Needham v. Johnson</i> .)	Threats .....	79, 82, 83, 84
Kendall v. Hamilton.	1879	4 App. C. 516; 48 L. J. C. P. 705; 41 L. T. N. S. 418.	Aid Prayer ....	61
Kensington, &c. Co. v. Lane Fox Elec. Co., Ltd.	1891	(1891) 2 Ch. 574; 64 L. T. 770; 8 R. P. C. 277.	Corporation ....	76
			Grievance .....	85
			Injunction ....	88
			Ouster of 32nd section.	95
			Patentee .....	77
			Threats .....	82

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<i>Kilderby, Rex v.</i> ....	....	(See <i>Rex v. Kilderby.</i> )		
<b>King, Brown &amp; Co. v. Anglo-Amer. Brush Corp.</b>	1890	6 R. P. C. 414 ; 7 R. P. C. 436.	Declaration of invalidity.	94
<i>King's Case, Auditor..</i> ....	....	(See <i>Auditor King's Case.</i> )		
<b>Kingston v. Corker ..</b>	1892	29 L. R. Ir. 364 .....	Procedure .....	92
<i>Knight, Auto. Weighing Machine Co. v.</i> ....	....	(See <i>Auto. Weighing M. Co. v. Knight.</i> )		
<b>Knight's Case</b> .....	1588	5 Co. Rep. (pt. 2) 56 ....	Construction....	114
<i>Kossuth, Emperor of Austria v.</i> ....	....	(See <i>Emperor of Austria v. Kossuth.</i> )		
<i>Krupp, Vavas seur v.</i> ... ..	....	(See <i>Vavas seur v. Krupp.</i> )		
<b>Kurtz v. Spence (1) ..</b>	1886	33 Ch. D. 579 ; 3 R. P. C. 368 ; 55 L. T. 317 ; 55 L. J. Ch. 919.	Patentee .....	77
			Procedure .....	92
			Threats action ..	91
<b>Kurtz v. Spence (2) ..</b>	1887	36 Ch. D. 770 .....	Procedure .....	92, 93, 136
			Threats action ..	91
<b>Kurtz v. Spence (3) ..</b>	1888	5 R. P. C. 161 ; 57 L. J. Ch. 238.	Certificate of validity.	93, 145
			Damages .....	91, 93
			Injunction ....	86
			Pleading .....	97
			Threats .....	81
<b>Lamb, In re</b> .....	1894	(1894) 2 Q. B. 805 .....	Grievance .....	43
<b>Lancashire Expl. Co. Ld. v. Roburite Co. Ld.</b>	1895	12 R. P. C. 483 .....	Forfeiture .....	45
<i>Lavater, Walton v.</i> ....	....	(See <i>Walton v. Lavater.</i> )		
<b>Law v. Ashworth</b> ....	1890	7 R. P. C. 88 .....	Procedure .....	92
<b>Lee v. Clarke</b> .....	1802	2 East, 333 .....	Pleading .....	141, 142
<b>Legat's Case, Arthur</b>	1612	10 Co. Rep. 109 .....	Certain knowledge.	111
			Construction....	273
			Grant.....	116
			Mere motion....	112
<b>Leicester v. Heydon..</b>	1493	Plowd. 397 .....	Grant.....	119
<i>Levinstein, Badische, &amp;c. v.</i> ....	....	(See <i>Badische, &amp;c. v. Levinstein.</i> )		

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<i>Lindsay, Gaulard and Gibbs v.</i>	....	(See <i>Gaulard and Gibbs v. Lindsay.</i> )		
<i>Linford, Otto v. ....</i>	....	(See <i>Otto v. Linford.</i> )		
<b>Liverpool and Brazil v. L. and St. Katherine's S. N. Co.</b>	1875	W. N. (1875) 203 .....	Procedure .....	149
<i>Loe, Frearson v. ....</i>	....	(See <i>Frearson v. Loe.</i> )		
<i>L. &amp; N. W. Railway, Holmes v.</i>	....	(See <i>Holmes v. L. &amp; N. W. Railway.</i> )		
<i>L. &amp; St. Katherine's S. N. Co., Liverpool &amp; Brazil v.</i>	....	(See <i>Liverpool &amp; Brazil v. L. &amp; St. Katherine's S. N. Co.</i> )		
<i>Lord Provost of Perth, Hay v.</i>	....	(See <i>Hay v. Lord Provost of Perth.</i> )		
<b>Lynch v. Macdonald</b>	1888	37 Ch. D. 234 ; 57 L. J. Ch. 651 ; 58 L. T. 293.	Joinder .....	138
<i>Macdonald, Lynch v. ....</i>	....	(See <i>Lynch v. Macdonald.</i> )		
<b>Mackie v. Solvo Laundry Co. Ltd.</b>	1892	9 R. P. C. 466 .....	Injunction .... Threats .....	86 82
<b>MacRae v. Holdsworth.</b>	1848	2 De G. & Sm. 496 ....	Forfeiture .....	46
<i>Malcolmson, Plimpton v.</i>	....	(See <i>Plimpton v. Malcolmson.</i> )		
<b>Markham's Case ....</b>	1580	10 Co. Rep. 113 .....	Construction....	273
<i>Martin, Gt. Australian G. M. Co. v.</i>	....	(See <i>Gt. Aus. G. M. Co. v. Martin.</i> )		
<i>Marylebone, Garrett v. JJ. of.</i>	....	(See <i>Garrett v. JJ. of Marylebone.</i> )		
<b>Milne v. Graham ....</b>	1823	1 B. & C. 192 ; 2 Dowl. & Ry. 293.	Penal Statute ..	52
<b>Mines, Case of .....</b>	1568	Plowd. 337 .....	Certain knowledge. Recitals .....	111 113

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Minter v. Williams</b> ..	1835	5 Nev. & M. 647; 5 L. J. N. S. K. B. 60; 4 A. & E. 251; 1 Har. & W. 585; 1 W. P. C. 135.	Construction.... Grant.....	120 116
<b>Mitchel v. Reynolds</b> ..	1711	1 P. Wms. 197.....	Validity.....	117
<b>Molyn's Case, Sir John</b>	1598	6 Co. Rep. 6.....	Grant.....	117
<b>Monopolies, Case of</b> ..	1603	11 Co. Rep. 85; Noy, 173; Moore, K. B. 671; 1 W. P. C. 1. App. II. p. 193.	Book of Bounty Especial Licence Monopoly .....	15 121 67
<i>Morgan, Burt v.</i> ....	....	(See <i>Burt v. Morgan &amp; Co.</i> )		
<i>Mussary, R. v.</i> .....	....	(See <i>R. v. Mussary.</i> )		
<i>Mussory, Rex v.</i> .....	....	(See <i>Rex v. Mussory.</i> )		
<b>Needham v. Johnson</b> ..	1884	1 R. P. C. 58 .....	Construction....	150
<b>Needham v. Oxley</b> ..	1863	8 L. T. N. S. 604; Goodeve; 2 New Reps. 388.	Forfeiture .....	46, 47
<b>Neilson v. Harford</b> ..	1841	8 M. & W. 806; 11 L. J. N. S. Ex. 20; 1 W. P. C. 310.	Construction....	115, 131
<i>Neilson, Reg. v.</i> .....	....	(See <i>Reg. v. Neilson.</i> )		
<i>Neustadt, Von Heyden v.</i>	....	(See <i>Von Heyden v. Neustadt.</i> )		
<i>New Brunswick Trading Co., Simson v.</i>	....	(See <i>Simson v. New Bruns. T. Co.</i> )		
<i>North Br. Rail. Co., Caledonian Rail. Co. v.</i>	....	(See <i>Caledonian Rail. Co. v. N. B. Rail. Co.</i> )		
<b>N. L. Rail. v. G. N. Rail.</b>	1883	11 Q. B. D. 40; 52 L. J. Q. B. 380.	Injunction ....	18, 133
<b>Nurse v. Geeting or Gething.</b>	1834	3 Dowl. P. C. 158; 4 L. J. N. S. Ex. 4; 5 Tyr. 179; 1 C. M. & R. 567.	Imparlance ....	64
<b>Nuttall v. Hargreaves</b>	1892	(1892) 1 Ch. 29 .....	Validity.....	110
<i>Official Receiver, Ex parte The.</i>	....	(See <i>Reed, Bowen &amp; Co., In re.</i> )		
<i>Official Receiver, Ex parte, Wells and Croft.</i>	....	(See <i>Wells and Croft, Ex parte Official Receiver.</i> )		



Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Otto v. Linford</b> .....	1882	46 L. T. N. S. 39 ; Goodeve.	Construction....	115
<b>Otto v. Steele</b> .....	1885	2 R. P. C. 139 .....	Procedure .....	149
<b>Otto v. Sterne</b> .....	1885	2 R. P. C. 139.....	Procedure .....	149
<b>Overton v. Burn</b> ....	1896	13 R. P. C. 455 .....	Agency .....	78
			Injunction ....	86
			Threats .....	82
<i>Oxley, Needham v.</i> ....	....	(See <i>Needham v. Oxley</i> .)		
<i>Parnell, Dredge v.</i> ....	....	(See <i>Dredge v. Parnell</i> .)		
<i>Patent Investment Co., Limited, Crampton v.</i>	....	(See <i>Crampton v. Patent Investment Co., Limited</i> .)		
<i>Patterson, Washburn and Moen v.</i>	....	(See <i>Washburn and Moen v. Patterson</i> .)		
<b>Pattison v. Gilford</b> ..	1874	18 Eq. 263 .....	Injunction.....	152
<b>Payne, In re, Ex parte Castle Mail Packet Co.</b>	1887	18 Q. B. D. 154 .....	Grievance .....	42
<i>Pearson, Grey v.</i> .....	....	(See <i>Grey v. Pearson</i> .)		
<b>Penal Statutes, Case of</b>	1605	7 Co. Rep. 36 ; see App. II. p. 232.	Book of Bounty Construction....	157
			Penal Statute ..	55
<b>Penwarren v. Thomas</b>	1561	Dyer, 198 a .....	<i>Sci. fa.</i> .....	118
<i>Perry, Skinner v.</i> ....	....	(See <i>Skinner v. Perry</i> .)		
<b>Piercy v. Young</b> ....	1880	15 Ch. D. 478 ; 42 L. T. N. S. 292.	Procedure .....	147
<b>Pinney v. Hunt</b> .....	1877	6 Ch. D. 98 .....	High Court ....	56
<i>Pintsch, Douglass v.</i> ..	....	(See <i>Douglass v. Pintsch</i> .)		
<i>Plane, Harmer v.</i> ....	....	(See <i>Harmer v. Plane</i> .)		
<b>Plimpton v. Malcolmson.</b>	1876	3 Ch. D. 531 ; 45 L. J. Ch. 505 ; 34 L. T. N. S. 340 ; Seton on Judgments, 5th ed. p. 565.	Forfeiture .....	49
<i>Pneumatic Tyre Co., Edlin v.</i>	....	(See <i>Edlin v. Pneumatic Tyre Co.</i> )		



## TABLE OF CASES.

xxxī

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
Postcard Automatic Supply Co. v. Samuel	1889	6 R. P. C. 560 .....	Licensees .....	131
Powell's Trade Mark.	1894	(1894) App. C. 8; 69 L. T. 60; 11 R. P. C. 8.	Grievance .....	42
<i>Price, Crane v.</i>	....	(See <i>Crane v. Price.</i> )		
Ralph's Trade Mark.	1883	25 Ch. D. 194 .....	Grievance .....	42
Rawlinson v. Stone ..	1746	3 Wils. 4 .....	Penal Statute ..	52
Reed, Bowen & Co., <i>In re, Ex parte</i> Official Receiver.	1887	19 Q. B. D. 174 .....	Grievance .....	42
Reeve v. Gibson ....	1891	(1891) 1 Q. B. 660; 60 L. J. Q. B. 451; 64 L. T. 141.	Double Costs ..	58
Reg. v. JJ. of Andover	1886	16 Q. B. D. 711; 55 L. J. M. C. 143; 55 L. T. 23.	Grievance .....	42
Rex v. Benchers of Lincoln's Inn.	1825	4 B. & C. 855; 7 Dowl. & Ry. 351; 28 R. R. 482.	Mandamus ....	104
Rex v. Blunt .....	1738	Andr. 293 .....	Construction....	270
<i>Reg. v. Bushopp, Richd.</i>	....	(See <i>Alton Woods, Case of.</i> )		
Rex v. Capper .....	1817	5 Pri. 217 .....	Construction....	273
Rex v. Chester (Bishop)	1697	Skin. 651; 5 Mod. 297; Carth. 440; 2 Salk. 560; 1 Ld. Raym. 292.	Construction....	271
Rex v. Chester (Bishop)	1786	1 T. R. 404; 1 R. R. 237	Mandamus ....	104
<i>Reg., Feather v.</i> .....	....	(See <i>Feather v. Reg.</i> )		
Rex v. Kempe .....	1694	4 Mod. 277; Carth. 350; Comb. 334; Salk. 465; Skin. 446; 1 Ld. Raym. 50.	Validity .....	272
Rex v. Kilderby ....	1669	1 Wms. Saund. 309 b, n. 5.	Pleading .....	39, 140
Rex v. Massory .....	1738	Andr. 295 .....	Construction....	270
Rex v. Mussary .....	1738	1 W. P. C. 41; App. V. p. 268.	Construction....	113, 114
Reg. v. Neilson .....	1842	1 W. P. C. 673 .....	Recitals .....	109
			<i>Sci. ja.</i> .....	118
Rex v. Rochester and Clark.	1686	1 Mod. 195; 2 Mod. 1; 3 Keb. 412.	Construction....	273

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Rex v. Wyndham</b> ....	....	1 Cowp. 378 .....	Mandamus ....	104
<b>Rex v. JJ. of York</b> ..	1834	1 Ad. & E. 834 .....	Penal Statute ..	52
<i>Reynolds, Mitchell v.</i> ...	....	(See <i>Mitchell v. Reynolds</i> .)		
<i>Richardson, Universities of Oxford and Cambridge v.</i>	....	(See <i>Universities of Oxford and Cambridge v. Richardson</i> .)		
<i>Roberton, Bailey v.</i> ..	....	(See <i>Bailey v. Roberton</i> .)		
<i>Robertson, Cadell v.</i> ..	....	(See <i>Cadell v. Robertson</i> .)		
<i>Roburite Exp. Co. Ltd., Lancs. Exp. Co. Ltd. v.</i>	....	(See <i>Lancs. Exp. Co. Ltd. v. Roburite Exp. Co. Ltd.</i> )		
<i>Royle, Challender v.</i> ..	....	(See <i>Challender v. Royle</i> .)		
<i>Russell, Bedell v.</i> ....	....	(See <i>Bedell v. Russell</i> .)		
<b>Russell v. Cowley</b> ....	1835	1 C. M. & R. 864; 1 W. P. C. 465.	Procedure .....	150
<b>Rutland's Case, Earl of.</b>	1608	8 Co. Rep. 56 a .....	Construction....	114, 115
<b>Sackville College, Case of.</b>	1669	Raym. 179 .....	Validity.....	109
<b>Salt v. Cooper</b> .....	1881	16 Ch. D. 549; 50 L. J. Ch. 579.	High Court ....	56
<i>Samuel, Postcard Auto. S. Co. v.</i>	....	(See <i>Postcard Auto. S. Co. v. Samuel</i> .)		
<i>Sandys, E. India Co. v.</i>	....	(See <i>E. India Co. v. Sandys</i> .)		
<b>Sharp v. Brauer</b> ....	1886	3 R. P. C. 193 .....	Procedure .....	97
<i>Sharp, Brauer v.</i> ....	....	(See <i>Brauer v. Sharp</i> .)		
<i>Shew, Skinner v.</i> ....	....	(See <i>Skinner v. Shew</i> .)		
<b>Shrewsbury's Case, Earl of.</b>	1611	9 Co. Rep. 47 .....	Grant.....	116
			Validity.....	109
<i>Siddell, Vickers v.</i> ....	....	(See <i>Vickers v. Siddell</i> .)		
<b>Sidebotham, Ex parte</b>	1880	14 Ch. D. 465; 49 L. J. Bk. 41; 42 L. T. 783.	Grievance .....	41, 42

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Simson v. New Brunswick Trading Co.</b>	1888	5 Times R. 148 .....	Procedure .....	148
<b>Skinner v. Perry ....</b>	1892	67 L. T. 696; 10 R. P. C. 1. (See <i>Skinner v. Shew</i> .)	Damages ..... Injunction ..... 32nd section .... Threats .....	91 134 75 71
<b>Skinner v. Perry ....</b>	1894	63 L. J. Ch. 826; 11 R. P. C. 411.	Grievance .....	85
<b>Skinner v. Shew ....</b>	1892	(1893) 1 Ch. 420. (See <i>Skinner v. Perry</i> .)	Common law .. Injunction .... Licenses ..... Monopolies .... Privilege ..... 32nd section .... Threats .....	72 93 99 11 76, 79 75, 85 17, 71, 78, 80, 82, 84, 135
<b>Skinner v. Shew ....</b>	1894	(1894) 2 Ch. 581 .....	Damages .....	91
<b>Smith v. Hargrove ..</b>	1885	16 Q. B. D. 184 .....	Procedure .....	148
<i>Snell, Ward v. ....</i>	....	(See <i>Ward v. Snell</i> .)		
<b>Société Anon. &amp;c. v. Tilghman's, &amp;c. Co.</b>	1883	25 Ch. D. 11; 53 L. J. Ch. 1; 49 L. T. 451.	Injunction .... Licensees .....	86, 88 131
<b>Société Anon., In re Trade Mark of.</b>	1894	(1894) 1 Ch. 61; (1894) 2 Ch. 26.	Grievance .....	43
<i>Solvo Laundry Co., Mackie v.</i>	....	(See <i>Mackie v. Solvo Laundry Co.</i> )		
<i>So. Counties Dep. Bk., Tuck v.</i>	....	(See <i>Tuck v. So. Counties Dep. Bk.</i> )		
<i>Spence, Kurtz v.</i>	....	(See <i>Kurtz v. Spence</i> .)		
<b>Spencer, Earl v. Swannell.</b>	1838	3 M. & W. 163; 6 Dowl. P. C. 326; 7 L. J. N. S. Ex. 73.	Penal Statute ..	53, 56
<i>Squire, Herrburger v.</i>	....	(See <i>Herrburger v. Squire</i> .)		
<b>Stationers' Co. v. Carran.</b>	....	2 Wm. Bl. 1003 .....	Prerogative ....	225
<i>Steel, Otto v. ....</i>	....	(See <i>Otto v. Steel</i> .)		
<i>Sterne, Otto v. ....</i>	....	(See <i>Otto v. Sterne</i> .)		
<i>Stone, Rawlinson v. ..</i>	....	(See <i>Rawlinson v. Stone</i> .)		

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<i>Stott, Tangye v. ....</i>	....	(See <i>Tangye v. Stott.</i> )		
<b>Sugg v. Bray.....</b>	1885	2 R. P. C. 246 .....	Common law ..	16
<i>Sugg, Ungar v. ....</i>	....	(See <i>Ungar v. Sugg.</i> )		
<i>Swannell, E. Spencer v. ....</i>	....	(See <i>Spencer v. Swannell.</i> )		
<b>Sykes v. Howarth....</b>	1879	12 Ch. D. 832; 48 L. J. Ch. 769; 41 L. T. N. S. 79.	Grant..... Infringement .. Patent Grant ..	116 127 106
<b>Tangye v. Stott.....</b>	1866	14 W. R. 386; W. N. (1866) 68.	Forfeiture .....	48
<b>Tasmanian Co. v. Clarke.</b>	1879	27 W. R. 677 .....	Procedure .....	149
<i>Taylor, Willoughby v. ....</i>	....	(See <i>Willoughby v. Taylor.</i> )		
<i>Taylor's Case, Ipswich ....</i>	....	(See <i>Ipswich Taylors' Case.</i> )		
<b>Thomas v. Hunt ....</b>	1864	17 C. B. N. S. 183; Goodeve.	Licensees ..... Sole Privilege ..	123, 128 122
<i>Thomas, Penwarren v. ....</i>	....	(See <i>Penwarren v. Thomas.</i> )		
<i>Thompson, Hill v. ....</i>	....	(See <i>Hill v. Thompson.</i> )		
<i>Thompson, Isaacson v. ....</i>	....	(See <i>Isaacson v. Thompson.</i> )		
<i>Thomson, Dudgeon v. ....</i>	....	(See <i>Dudgeon v. Thomson and Another.</i> )		
<i>Tilghman's, &amp;c. Co., Société Anon., &amp;c. v. ....</i>	....	(See <i>Société Anon., &amp;c. v. Tilghman's, &amp;c. Co.</i> )		
<i>Tomlins, Wigley v. ....</i>	....	(See <i>Wigley v. Tomlins.</i> )		
<b>Tuck v. So. Counties Dep. Bank.</b>	1889	42 Ch. D. 477; 60 L. T. 885.	Pleading .....	52
<b>Ungar v. Sugg .....</b>	1892	8 R. P. C. 388; 9 R. P. C. 113.	Agency ..... Damages ..... Threats ..... Procedure .....	77 90, 91 78, 79, 83 92
<b>Union Elec., &amp;c. Co. v. Elec. Power St. Co.</b>	1888	38 Ch. D. 327; 57 L. T. 791.		
<i>United Telephone Co., Barney v. ....</i>	....	(See <i>Barney v. U. T. Co.</i> )		
<b>United Telephone Co. v. Walker and Another.</b>	1887	4 R. P. C. 64; 56 L. T. 508.	Forfeiture .....	45, 51

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
Universities of Oxford and Cambridge v. Richardson.	1802	6 Ves. 689.....	Grant.....	118, 119, 123, 225
			Prejudicial Grant	130
<i>Van Vlissingen, Caldwell v.</i>	....	(See <i>Caldwell v. Van Vlissingen.</i> )		
Vavasour v. Krupp..	1878	9 Ch. D. 354; 39 L. T. N. S. 437.	Forfeiture.....	50
Vernon's Case .....	1572	4 Co. Rep. 5.....	Estoppel .....	57
Vickers v. Siddell....	1890	15 App. C. 499.....	Validity.....	110
Von Heyden v. Neustadt.	1880	14 Ch. D. 233; 42 L. T. N. S. 300.	Construction... Grant..... Patent Grant ..	115 125, 126 106
Walker v. Clarke ....	1887	56 L. J. Ch. 239; 4 R. P. C. 113.	Grievance ..... Injunction .... Threats .....	85 86 81, 84
<i>Walker, U. T. Co. v.</i>	....	(See <i>U. T. Co. v. Walker.</i> )		
Waltham v. Austin ..	1599	8 Co. Rep. 125 a. ....	Forfeiture.....	45
Walton v. Bateman ..	1842	1 W. P. C. 613 .....	Grant..... Infringement .. Patent Grant ..	116 128 106
Walton v. Lavater ..	1860	8 C. B. N. S. 175; 29 L. J. C. P. 275; Goodeve.	Construction... Patent Grant ..	120 106
<i>Ward, Day v.</i> .....	....	(See <i>Day v. Ward.</i> )		
Ward v. Snell .....	1788	1 Hy. Bl. 13.....	Penal Statute ..	52
Warter v. Warter....	1890	15 P. D. 36; 62 L. T. 328.	Joinder .....	137
Washburn & Moen v. Patterson.	1884	1 R. P. C. 162 .....	Forfeiture .....	50
<i>Waterloo, &amp;c. Co., Driffield, &amp;c. Co. v.</i>	....	(See <i>Driffield, &amp;c. Co. v. Waterloo, &amp;c. Co.</i> )		
Watson v. Holliday ..	1882	20 Ch. D. 782; 30 W. R. 747.	Damages ..... Infringement ..	129 117
<i>Weardale I. &amp; C. Co., Eden v.</i>	....	(See <i>Eden v. Weardale I. &amp; C. Co.</i> )		
<i>Weild, Wren v.</i> .....	....	(See <i>Wren v. Weild.</i> )		
<i>Weld, Brewster v.</i> ....	....	(See <i>Brewster v. Weld.</i> )		
Wells & Croft, Ex parte O. R.	1895	72 L. T. 361.....	Double Costs ..	58

Title of Case.	Date.	Where reported.	Point.	Where cited in this Book.
<b>Wells v. Igulden</b> ....	1824	3 B. & C. 186 .....	Pleading .....	52
<i>Whitaker, Boyce v.</i> ..	....	(See <i>Boyce v. Whitaker.</i> )		
<i>Whittingham, Cooper v.</i> ....	....	(See <i>Cooper v. Whittingham.</i> )		
<i>Wigley, Bainbridge v.</i> ....	....	(See <i>Bainbridge v. Wigley.</i> )		
<b>Wigley v. Tomlins</b> ..	1834	3 Dowl. P. C. 7 .....	Imparlanee ....	64
<b>Wilkinson v. Colley</b> ..	1771	5 Burr. 2698.....	Penal Statute ..	52, 56
<i>Williams, Minter v.</i> ..	....	(See <i>Minter v. Williams.</i> )		
<b>Williams v. Williams</b> .	1817	3 Mer. 160; 17 R. R. 49..	Bounty .....	107
<b>Willoughby v. Taylor</b> .	1894	11 R. P. C. 52 .....	Certificate of validity Damages .....	93 91, 93
<i>Wilmott, Betts v.</i> ....	....	(See <i>Betts v. Wilmott.</i> )	Threats .....	76, 79, 84
<b>Wilson v. Walter E. Church Eng. Co., Limited.</b>	1885	2 R. P. C. 175 .....	Injunction ....	85
<i>Wood, Hasker v.</i> ....	....	(See <i>Hasker v. Wood.</i> )		
<b>Wren v. Weild</b> .....	1869	4 L. R. Q. B. 730; 10 B. & S. 51; 38 L. J. Q. B. 327; 20 L. T. N. S. 1008.	<i>Bona fides</i> .....	39
<i>Wright, Hassall v.</i> ....	....	(See <i>Hassall v. Wright.</i> )	Common law ..	12, 75
<i>Wyndham, Rex v.</i> ....	....	(See <i>Rex v. Wyndham.</i> )	Threats .....	71
<i>York, JJ. of, Rex v.</i> ...	....	(See <i>Rex v. JJ. of York.</i> )		
<b>Young's Patent</b> .....	<i>Circa.</i> 1859	Lawson, 105.....	<i>Sci. fa.</i> .....	118
<i>Young, Piercy v.</i> ....	....	(See <i>Piercy v. Young.</i> )		



# MONOPOLIES BY PATENTS.

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## CHAPTER I.

### INTRODUCTORY.

THE present condition of the Patent law, with reference to those remedies which it provides for the public against the abuse of patent right, is capable of being stated only in the form of an historical summary. The difficulty of putting it into the form of *theorem* arises from the circumstance that conflicting decisions, inconsistent Acts of Parliament and long disuse of the principal remedy provided by law have brought it into a state of confusion which, apart from the historical causes leading to this result, would be quite unintelligible. A brief summary from this point of view of the history of the Patent law will therefore be submitted as an introduction to the present work.

Present state  
of the law.

The story takes its rise at a period rich in the beginnings of English law, and may fitly enough be dated as of the year 1600. The singularly able monarch who at that date both reigned and ruled had stretched the prerogative of interference in the course of trade to the breaking point. The oppressions practised in her name, and under authority of her patents, had produced a reaction in the public mind which, with less skilful management than she brought to bear upon affairs of State, might easily have given occasion to a political convulsion. Queen Elizabeth, however, with her accustomed tact, staved off the evil hour. She compromised the dispute by means of fair words and a State function, and afforded some relief from the mischief complained of, by recalling a few of the most flagrantly iniquitous of her monopoly grants. It

Beginnings  
of the Patent  
law.

would be easy, judging from the facility with which she quelled the storm, to imagine that the whole agitation had been the work of a few unquiet spirits, and had no broad foundation in the general and popular indignation. So to judge would, however, be greatly to misunderstand the facts.

Popular  
feeling about  
monopolies.

The strength of the popular feeling is indicated by the strength of the measures which were adopted to repress the evil, and is justified by statements which have been left to us concerning the manner in which patent rights at that date were put in execution. The following passage from D'Ewes' Journal of the Parliament of 1601 is very instructive on this point:—

“Mr. Spicer, burgess of Warwick, stood up and said . . . The substitutes (*a*) for aquavitæ and vinegar came not long since to the town where I serve, and presently stayed sale of both these commodities; unless the sellers would compound with them, they must presently to the Council Table. Myself, though ignorant, yet not so unskilful, by reason of my profession, but that I could judge whether their proceedings were according to their authority, viewed their patent and found they exceeded in three points for where the patent gives months' liberty to the subject that hath any aquavitæ to sell the same, this person comes down within two months and takes bond of them to his own use where he ought to bring them before a justice of the peace, and they there be bound in recognizance, and after to be returned into the Exchequer, and so by usurpation retaineth power in his own hands to kill or save” (*b*).

Case of  
Monopolies.  
*Darcy v.*  
*Alvin.*  
See p. 193.

It was not in the House of Commons alone that the grievance of these monopoly grants found articulate expression. In the year 1602 the celebrated Case of Monopolies came before the Court of King's Bench, and there the popular doctrine appears to have been stated with admirable completeness by Croke, Doderidge and Fuller (*c*)

(*a*) *I.e.*, the patentee's deputies.

(*b*) D'Ewes, 644.

(*c*) Coke says Croke, Altham and Tanfield, 11 Rep. 85b, but this is probably a mistake. See below, p. 201.



arguing against the patent for the manufacture of playing cards. The judges evidently regarded this case as one of very unusual importance. In giving judgment they made an exhaustive statement of the common law upon the subject and they did not limit themselves to the statement of the law; they traced it to its foundations in the principles of economics and expatiated upon the inconvenience of monopolies in language which has become classic in this connection. The law which they then laid down has since become the law not only of England, but of America, of most of the British Colonies and of not a few foreign States. It is probably destined to become in the end a recognized principle of all civilized jurisprudence and constitutes in itself what is, perhaps, one of the most valuable contributions which British jurists have ever made to the theory of law.

This judgment was not delivered until after the Queen's death but the questions which had become so acute at this particular point of time were laid at rest by the line of conduct adopted by her during the short remainder of her reign. Nevertheless she bequeathed to her successor an open question concerning the extent of the prerogative, and, what for him was still more serious, a most seductive temptation to adopt an unpopular policy. The prerogative of interference in matters of trade, which Elizabeth had so effectually asserted and so skilfully preserved, afforded to James an irresistible temptation to transgress the limits of prudence.

It is not easy now to ascertain what precise attitude King James at first assumed towards the burning question of monopolies, but there is some reason for thinking that in the beginning of his reign he suffered himself to be advised upon the subject, and was content to abstain from transgression of what had been ascertained to be the limits of the prerogative in this particular. A significant but somewhat obscure observation by Sir Edward Coke, that the "judgment in *Darcy's Case* (the Case of Monopolies)

Policy of  
James I.

The Book of  
Bounty.  
See below,  
p 157.

was a principal motive for the king's book " (*d*), points in this direction. It would seem to follow from this that the decision of the judges in that case had been brought pointedly under the king's notice, and that he had signified his willingness to recognize it as authoritative upon the question of the nature and extent of the prerogative in question. Quite consistent with this view is the language of the book itself, which, however, will be more conveniently considered a little later on in the course of this review.

James'  
Speech to  
Parliament.

But whatever the steps by which it was reached, a position was established in the year 1609 which can be easily described. In the first place, the king had resolved to assert his personal authority in a more peremptory manner than heretofore, and conveyed this resolution to the Parliament in "one of his lectures at Whitehall" in which he explained that the power of kings resembled the power Divine. "For as God can create and destroy, make and unmake, at his pleasure, so kings can give life and death, judge all, and be judged of none. They can exalt low things and abase high things, making the subjects like men at chess, a pawn to take a bishop or a knight" (*e*). And Wilson, who, if he does not quote his language, certainly ascribes to the king no sentiments but those with which he was supposed to be animated at this time, remarks, in connection with the dissolution of this Parliament, that "being now seasoned with seven years' knowledge of his profession here (*f*), he thought he might set up for himself, and not be still journeyman to the lavish tongue of men that pryed too narrowly into the secrets of his prerogative" (*g*). It is indeed true that he did not in set terms threaten to infringe upon the rights of his subjects. But there were many collateral circumstances which gave a sinister significance to hints such as

(*d*) 3 Inst. 182.

(*f*) *I.e.*, in England.

(*e*) 2 Kennett, 682.

(*g*) 2 Kennett, 684.

these. In the first place, there were the notorious facts that the king was sorely pressed by want of money, and that his necessities arose from expenditure upon what was euphemistically called the royal "bounty." The king said that this expenditure was indispensable; that the ceremonial incident to the royal progress from Edinburgh to London, the reception of embassies of congratulation, and the return of such compliments was costly and inevitably so; that he would be unworthy of his great position if he were parsimonious on such an occasion and in reference to such matters. His critics, on the other hand, asserted that he had most unwarrantably diverted the stream of English wealth into the channel of Scottish well-being and that since the king's accession to the throne of England gold had become as plentiful in Edinburgh as it had been in Jerusalem in the days of Solomon and that silver, as under the Hebrew monarch, was "nothing accounted of"—that is to say, in the capital of Scotland. The grant of patents, being a source of royal bounty which it was singularly easy to set flowing, was naturally drawn upon for the purpose of satisfying in part what the king conceived to be his obligations in this respect and the English people, mindful of the extravagant pitch to which this abuse had been carried by Queen Elizabeth, were vigilant and insistent in their remonstrances.

A second circumstance which made the people of 1610 suspicious of the king's design to govern personally was the fact that he was supposed to have spoken disparagingly of the English common law in connection with an encomium passed upon Dr. Cowell's "Interpreter" (*h*). That this expression of opinion gave great offence is abundantly evident from the apologetic language employed by the king when explaining away his unfortunate deliverance in the "lecture," from which a quotation has been already made, delivered to the Parliament in 1609 (*i*).

The King's  
position.

Dr. Cowell's  
book.

(*h*) 2 Kennett, 681.

(*i*) See 2 Kennett, 682.

It was indeed a most reasonable apprehension that if the king were to become a personal ruler after the model of the Tudors, and withal to cast the English common law aside, no limit could be set to the revolutionary changes, in which such a departure might be expected to eventuate.

Yet a third circumstance deserves to be mentioned in this connection. The year 1610 saw the proclamations of King James collected in a volume and published in book form and from this the inference was drawn that it was intended, by republication in a formal shape, to give to these proclamations a new validity and place them more or less, perhaps altogether, in the position of laws.

Popular  
feeling in  
1610.

It is not surprising that circumstances such, as these should have produced in the public mind a profound feeling of unrest. The king's necessities, the aggressive tone which he had assumed and the disloyal views which he was believed to harbour combined to produce a state of apprehension which easily gave rise to excessive and ungrounded fears. That there was real cause for alarm the history of the subsequent years abundantly proves but it is easy to believe that the alarm, as is its wont, was in excess of its cause and that the king did not at this time contemplate measures so extreme as were attributed to him by those whose opinions were largely moulded by their fears.

If the facts corresponded in any measure to the sketch here given it will be abundantly clear that the king was deeply interested at this time in allaying the apprehensions which his own conduct had aroused and it is possible to acquit him entirely of conscious insincerity in the steps which he took to set the public mind at rest. One of these steps was the apologetic speech to the Parliament already referred to above. Another was the publication of the King's Book of Bounty—a remarkable volume, remarkable chiefly, perhaps, for what may be termed its career.

The contents of this book need not be considered at large in this place, for the document itself, being now republished as a part of the present volume, can be consulted by the reader (*e*). But it is, perhaps, not immaterial when considering it to bear in mind the motives which have been here conjecturally put forward for its publication. If it be correct to suppose that the king did not at this time intend to stretch the limits of the prerogative beyond the point to which it had been carried by the imperious Queen who had preceded himself upon the throne—and even an ambitious monarch might be well content to respect those limits—if, moreover, he honestly desired to convince his people that he did not contemplate any transgression of these recognized boundaries, then it would evidently be his endeavour to mould his declaration upon the recognized law of the land and it would be most natural that he should found upon the solemn deliverance of the bench of judges which decided the Case of Monopolies. This agrees exactly with what Sir Edward Coke tells us (*f*), and it agrees also with what is said in the preamble of the Statute of Monopolies (*g*). In any case, the fact is undeniable that this declaration is drawn up with scrupulous regard to the common law and the doctrine of prerogative as ascertained in the year 1610.

The Book of  
Bounty.  
See below,  
p. 161.

But notwithstanding the happy auspices amid which it first saw the light, the king's book did not achieve any notable success. The stream of royal bounty continued to flow and suitors, under more or less plausible pretexts, continued to apply for the prohibited monopolies and to secure them. When next the Parliament met effectively, in 1621, this grievance had assumed serious proportions and a strenuous effort was made by the representatives of the people to deal in an effective manner with the whole subject. But the difficulty of legislating upon this subject in a popular sense was extreme. As trenching

(*e*) See below, p. 161.

(*f*) 3 Inst. 182, and see above, p. 4.

(*g*) See below, p. 23.



upon the prerogative, the discussion itself was disagreeable in the last degree to James as it had been to Elizabeth and if it should become a question of cutting down the kingly power only the pressure of an absolute necessity would extort the king's consent.

Statute of  
Monopolies.  
See below,  
p. 21.

The promoters of the new statute were compelled therefore to walk warily and they hit upon the ingenious expedient of erecting the king's own declaration into a statute, thus securing for themselves the benefit of that statement of the law which he, in a moment of candour, had made many years before while they at the same time allayed his susceptibilities on the subject of the prerogative by exploiting his own language for the purposes of the new Act. This is apparently the significance of Sir Edward Coke's observation that the book moved the King to give the royal assent to this Act of Parliament (*h*).

As some considerable importance may attach to the circumstances which gave shape to this statute, it is proper here to draw attention to the fact that Dr. Gardiner appears to take a somewhat different view from that here developed of the king's share in the preparation of the "Book of Bounty." His view will be found in a letter which I am enabled by his permission to publish in the Appendix (*i*). Perhaps, however, it does not make any very great difference whether the king was or was not personally committed in his own opinion to the propositions of law contained in his declaration of 1610. If it were so, the task of persuading him to give his assent to the Bill would no doubt be all the easier for those who had to perform it. But whatever the difficulties were, the fact is that they were surmounted, and the interest of the historical facts concerning the transactions by which the royal assent was procured lies almost entirely in the very notable use which is made of the word "monopolies" (*k*). The Act, in its main clauses, follows very closely the decisions

(*h*) 3 Inst. 187.

(*i*) See below, p. 158.

(*k*) See below, p. 25.

in the Cases of Monopolies and Penal Statutes, its scheme being first to authenticate the statement of the law which in those cases was made upon the authority of the judges and then to create machinery for giving effect to the law as so defined. Statute of Monopolies.

From this point of view the most important parts of the statute are the second, third, and fourth sections. That these were regarded by the framers of the Act as its principal provisions might be inferred from the position which is assigned to them, even if we were not aware of the discussions which led up to them. For it is to be observed that these three sections follow at once upon the definition of the law, that they embody the immediate and practical consequences of that definition and that all that follows is only in the nature of saving and creates exceptions to the rule which the first four sections comprise. A very curious commentary upon this view, that the first four sections are the essence of the Act, is, however, afforded by its history in the Courts, for almost all the discussion which has taken place concerning it has related to the interpretation of the sixth section. A slight examination, however, shows that much more than this may be set down to the irony of fate. Taking the first four sections in order; the first section incorporates the Book of Bounty in the English statute law and the Book of Bounty has for upwards of 200 years been to all intents and purposes a lost document. First section.

The second section probably, at the time at which it was passed, served a most useful and necessary purpose but it has long been completely obsolete. It provides that patent rights shall be tried and determined only according to the common law. This provision has, until recent years, been very strictly observed, not however, because of the statute, which does not indeed appear to have ever attracted notice, but because, prior to the changes in common law procedure which have been introduced within the last fifty years, the practice of the tribunals prevented Equity Courts from Second section.

Statute of  
Monopolies.

entertaining the substantive questions to which patent rights give rise. Even before that time Courts of Equity made no scruple about issuing injunctions in support of rights which had been vindicated at law or which were in course of being so established and at the present day it certainly would puzzle anyone to say in what sense patent rights can be said to be within the exclusive jurisdiction of the Common law.

Third section.

Passing to the third section, we find a provision disabling all persons to hold or exercise monopoly rights; a provision which probably in its inception was inserted as a matter of superabundant caution and was never expected to have any great practical significance. Certainly, whatever its authors thought of it, legal practitioners have never been able to turn it to any account.

Fourth  
section.

This brings us to the fourth section of the Act which has had a history the most remarkable of all. There cannot be a doubt that this section was intended to be the great bulwark of the public right against the encroachments and oppressions of monopolists. It is penned with the utmost care. Nothing is omitted that could facilitate proceedings on the part of an aggrieved person in assertion of his rights. The causes of delay and hindrance in the prosecution of the action were, as far as possible, excluded by stringent provisions relating to procedure. Relief given to a successful plaintiff was to be upon the amplest scale, and by virtue of the position into which the law had been brought by the form of its enunciation in the first section the presumptions of law were all to be in the plaintiff's favour. It is, perhaps, not over-rash to assert that never has ampler provision been made for the protection of an oppressed class against their oppressors short of enactments which convert the oppressive act into a crime. Of civil remedies this one might be adduced as an example of the utmost that it is in the power of Parliament to do in the way of arming the weak against the strong.



It stands to reason that such extraordinary measures could only have been taken for the purpose of dealing with a mischief of an egregious kind. And, indeed, it is but a commonplace observation upon the history of that time that the mischief was egregious and, in the then existing temper of the public mind, insupportable. This mischief has never wholly ceased to exist; patent rights are no longer a weapon in the hands of the Crown, they can no longer be used for the oppression of the public at large, they can no more give rise to serious constitutional difficulties. But, though shorn of their old terrors, they have never ceased to be matters of capital importance for good or ill in relation to trade and industry. Even at the present day a large importance must be assigned to the considerations embodied by Lord Justice Bowen in the following passage from his judgment in *Skinner v. Shew* (1), “Now, every person of common sense knows what is involved in patent actions, and what the expense of them is, and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man in business and is the thing most calculated to paralyse a man in his business, even if he be innocent of any infringement of patent law.” Moreover, it is not alone actions upon patents which are apt to embarrass the course of legitimate trade. The growing tendency of patentees to have recourse to threats of legal proceedings, and particularly to address their threats to customers and other persons whose interest in the threatened industry is comparatively small, has within our own times given to patent rights—indeed, to patent grants whether good or bad—a character and importance at once new and formidable. The interest of the public in an available remedy against the encroachments of patentees has, therefore, never ceased to be a matter of great and pressing importance. It has, of course, varied in importance from time to time; it has derived its importance, now from one source, again from another, but it

The mischief.

See p. 75.

has always been a matter in which vast interests were involved.

Action upon  
the fourth  
section.  
See p. 52.

All this, notwithstanding, there is no record that any action has ever been brought upon this section. The section itself remains upon the statute book, and is unquestionable law at this moment. The obsolete sections of the statute were pruned away by the Statute Law Revision Act of 1863 (*m*), and the phraseology of sect. 4 was resettled by that of 1888 (*n*). It has received the official sanction of recent republication in its present form in the second revised edition of the statutes. Yet it has suffered eclipse by a long series of decisions in the Courts which are irreconcilably at variance with its provisions and it was conspicuously ignored in the drafting of the Patents, Designs and Trade Marks Act of 1883. To this point our narrative may now proceed.

*Wren v.*  
*Weild.*  
See p. 71.

The source of the confusion in recent times can be distinctly traced. It starts from the action of *Wren v. Weild* (*o*). In that case the action was shaped as an action of slander of title and the slander complained of was a statement to the effect that certain spooling machines were infringements of the defendant's patents. The statement was made to intending purchasers from the plaintiff and the case was argued and decided entirely upon the law of slander. It can hardly be doubted that the grievance complained of in this case fell within the very ample provisions of the fourth section of the Statute of Monopolies. The plaintiff, according to his declaration, was a person who had been "hindered and grieved" by occasion or pretext of a monopoly which is all that is required to bring him within the protection of the Act. At the trial he proved that his intending customers had refused to buy his machines by reason of the defendant's threats. There was no dispute that the defendant had insisted upon his patent rights, and that it was by virtue of his patent that he had succeeded in preventing the plaintiff from selling

(*m*) 26 & 27 Vict. c. 125. (*n*) 51 Vict. c. 3. (*o*) L. R. 4 Q. B. 730.

his machines. It would seem, therefore, that an action grounded upon the statute must have lain and that in such an action the defendant would have been at the disadvantage of being compelled to bring himself within the exception created by the sixth section of the statute; in other words, that the validity of the patent must have come into question and that only by establishing that validity could the defendant make out his defence. Curiously enough, however, the action was not grounded upon the statute. It was considered to raise a new point and one which was recognized as being a point of capital importance in connection with Patent law. It was argued accordingly and with great wealth of authority drawn, some of it, from Croke's Reports and Coke's; that is to say, from dates anterior to the Statute of Monopolies. But the statute itself was not so much as mentioned either in the arguments or the judgments and the only question discussed was whether under the law of slander the plaintiff was entitled to recover damages for the injury that he had suffered. In accordance with this view the plaintiff pleaded that the defendant's allegations had been falsely and maliciously made and throughout the case, both in argument and judgment, it seems to have been assumed that the false and malicious character of the allegations complained of was essential to the cause of action. Deciding upon this restricted ground, and without any reference to statutable rights, the Divisional Court held that, "where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in all fairness bound, to give the intending purchaser warning of such his intention; and consequently no action can lie for giving such preliminary warning unless either it can be shown that the threat was made *malà fide*, only with the intent to injure the vendor and without any purpose to follow it up by an action against the purchaser, or circumstances were such as to make the bringing of an action altogether wrongful" (*p*).

Wren v.  
Weild.

*Wren v.*  
*Weild.*

And further that, "as soon as it was shown in evidence that the defendant really had a patent right of his own and was asserting it the occasion privileged the communication and the plaintiffs were bound to prove such malice as would support the action." . . . "The advisers of the plaintiffs seem to have thought it was enough to maintain this action to show that the defendant could not really have maintained any action, and that, if well-advised, he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained; whereas, as we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had but a *malâ fide* and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge that it was without any foundation."

In accordance with the view that malice was of the essence of this action, it was held that the plaintiff could not be allowed to dispute the validity of the patent.

The doctrine of *Wren v. Weild* was explained in *Halsey v. Brotherhood* (q). The facts in that case were not materially different from those in *Wren v. Weild* and the only real distinction between the two cases seems to have been that in *Wren v. Weild* the relief sought was damages, whereas in *Halsey v. Brotherhood*, although a formal claim for damages was introduced, the plaintiff's real object was to obtain an injunction. The importance of *Halsey v. Brotherhood* lies in the circumstance that the principles embodied in *Wren v. Weild* are stated much more broadly and pushed farther than in the original case. In deciding *Halsey v. Brotherhood* the Master of the Rolls (Jessel) held:—"The plaintiff must make out, if he wants to maintain an action for damages, that the defendant has not been acting *bonâ fide*. If he wants an injunction he

*Halsey v.*  
*Brotherhood.*  
See p. 72.



must make out that the defendant intends to persevere in making the representations complained of, although his allegation of infringement by the plaintiff is untrue" (r). In the Court of Appeal the decision of *Halsey v. Brotherhood* was made to rest principally upon the authority of *Wren v. Weild*, and there again the case was disposed of as being simply an action in the nature of slander of title (s).

Lord Justice Baggallay states the law as follows (p. 390):—"The defendant's patent must be assumed to be valid, there having been no proceeding by *scire facias* to set it aside, and, assuming it to be a valid patent, he is entitled to all the rights and benefits which it conferred upon him and I take it to be the result of the case to which I have already referred that he was entitled to state that the engines manufactured by the plaintiffs were infringements of his patent and to threaten proceedings against any person in respect of such infringement, provided he observed the rule that those threats must have been made by him with reasonable and probable cause."

Lord Justice Lindley (p. 392) summarises *Wren v. Weild* and adopts the decision in that case in the following terms:—"If I am a patentee, so long as I act honestly I am entitled to say, without running the risk of having an action for damages brought against me, that somebody is infringing my patent or that somebody else's manufacture is an infringement of my patent. If I say that honestly, I am not liable to an action for damages. If I say it dishonestly I am so liable and if I know that what I say is untrue, it would not take much to persuade a jury that I was acting dishonestly and then an action for damages would lie. The absence of reasonable and probable cause would be proved as against anybody who kept on making such allegations dishonestly; but so long as the patentee makes such allegations honestly, *Wren v. Weild* shows that

(r) 15 Ch. D. 523.

(s) 19 Ch. D. 388.

*Halsey v.  
Brotherhood.*

no action lies against him. It seems to me also that no injunction will lie against him so long as he acts honestly. But if it is proved that his statement is false to his knowledge and there is reason to suppose that he intends to repeat those false statements an injunction ought to lie because he would be about to do that which he has no right to do. That, however, is not the theory upon which this action is brought. This action is brought upon the theory that the question of honesty or dishonesty is immaterial. That appears to me a mistake and I think the Master of the Rolls was right in dismissing the action without prejudice to any other action based upon different principles."

It is worthy of notice that in both these leading cases the law was expressly stated with reference to slander of title and in *Halsey v. Brotherhood* a reservation was made in view of the possibility that the case might have been shaped so as to wear a different legal aspect. In later cases these principles have not always been stated in the language in which they were originally formulated; it thus happens that *dicta* may be found importing that the rights of a plaintiff grieved by the proceedings of a patentee are, at common law, even less than was conceded in *Halsey v. Brotherhood*. (t)

The law having been settled by the Courts in this sense, it became necessary to provide some remedy for persons harassed in their trade by the threats of patentees to whom the decisions of the tribunals had afforded a much easier and more effective way of enforcing their claims than by an action at law and who were not slow to take advantage of the facility for encroaching upon the public right which was thus afforded to them.

The new remedy was given by the thirty-second section of the Patents Act, 1883. It is quite plain that in the drafting of this clause the fourth section of the Statute of

Patent Act,  
1883, s. 32.  
See pp. 71,  
243.

(t) See *Sugg v. Bray*, 2 R. P. C. 246.

Monopolies was entirely overlooked. The Act of 1883 Patent Act, sect. 32. deals only with the single case of interference on the part of the patentee with the plaintiff's trade by means of threats. This, as has been shown above in the discussion of the case of *Wren v. Weild*, is covered by the Statute of Monopolies and, so far as the action for damages is concerned, the relief obtainable under the earlier statute is much more ample than that obtainable under the Act of 1883. Had the Statute of Monopolies been present to the mind of the draughtsman he must either have limited the Act of 1883 to cases for which the Act of James did not provide or, more probably still, have repealed or materially amended the fourth section of the Statute of Monopolies. For this latter course good grounds of argument could have been adduced. The remedy given by the section which, so far as law books show, has never been applied in practice and which has for 200 years been so completely lost to knowledge that even the text-book writers pass it over without a word of notice—such a remedy could hardly be considered to be a matter of any public moment and there could not have been, upon practical grounds, much reason for hesitating about its repeal. If, however, it had been brought to the knowledge of the Legislature that such a remedy existed it is highly improbable that Parliament would have consented to take it away without supplying some more adequate equivalent than is afforded by the thirty-second section. Although it is quite certain that the Legislature of to-day would not re-enact the provisions in this respect of the Statute of Monopolies it is more than probable that Parliament would have gone much farther for the purpose of preserving the old remedy to the public than for the purpose of creating a new one. It was at the time supposed, and has repeatedly since that time been stated, that the thirty-second section gives a new right of action (u).

(u) *Combined, &c. Co. v. Automatic, &c. Co.*, 42 Ch. D. 668; *Skinner v. Shew*, (1893) 1 Ch. 420.

Statute of  
Monopolies  
and Patents  
Act com-  
pared.  
See below,  
p. 135.

In a sense this is quite true. The right of action given by that section is undoubtedly additional to the action for slander. In a formal sense it may be said to be additional to the action grounded on the Statute of Monopolies but in effect, having regard to the restrictions by which the thirty-second section is hedged about, it gives only a much more limited right to the public.

In one respect, however, the Act of 1883 goes beyond the Statute of Monopolies. Under the earlier Act it is necessary to show damage; under the Act of 1883 special damage need not be shown if an injunction only be asked for. In most other respects the thirty-second section serves only to abridge, if it at all affects, the rights conferred by the Statute of Monopolies.

See below,  
p. 133.

It may also be questioned whether under sect. 4 an injunction can now be granted. At the time of the passing of the Statute of Monopolies the Common Law Courts had no power to grant injunctions and by the terms of this section no such relief is provided for. It would, however, seem that the power to grant injunctions in support of a legal right is now appurtenant to a power to enforce the legal right by damages in all the Divisions of the High Court and therefore it will probably be held that, though not expressly provided for, an injunction can be granted in supplement of the remedy by way of damages which the section expressly gives (x).

Sect. 4 and  
sect. 32  
compared.  
See below,  
p. 134.

There being thus a choice of remedies questions will arise as to which is the more advantageous action to pursue. Probably in most cases the remedy given by the Statute of Monopolies will be preferred. Not only are its provisions as to damages and costs such as to be much more advantageous to the plaintiff if successful but he has the great advantage in this action of being able to compel the patentee to support the validity of his patent. The

(x) See the judgment of Cotton, L. J., in *N. L. Rail. Co. v. G. N. Rail. Co.*, 11 Q. B. D. 41.



provisions introduced in the Act of 1883 for the benefit of patentees have had the effect, to a very large extent, of destroying the remedy given to the public so that in point of fact it seldom happens that a threats action can be brought to a successful issue even in cases where the mischief contemplated by the statute has undeniably occurred.

The fourth section of the Statute of Monopolies and the thirty-second section of the Patents Act, 1883, deal with the principal grievances arising out of patents. But there is yet another statutable remedy to which attention must here be drawn. The Patents Act of 1883 made provision by its twenty-second section against a particular abuse of patent right defined in the following way:—

Obstructive  
patents.  
See p. 98.

“That by reason of the default of the patentee to grant licences on reasonable terms:—

- “(a) The patent is not being worked in the United Kingdom; or
- “(b) The reasonable requirements of the public with respect to the invention cannot be supplied; or
- “(c) Any person is prevented from working or using to the best advantage an invention of which he is possessed.”

To prevent this obstructive use of patent right it is provided that in such a case the Board of Trade may settle terms upon which the patentee shall be bound to grant licences. Up to the present time, however, it would seem as if the same fate is in store for this section of the Act of 1883 which has overtaken the fourth section of the Act of 1624, for there is no record of any application made to the Board of Trade under this provision. A reference to it is necessary to the completeness of any account of the remedies available to the public against the abuse of patent right but the subject has at present only a theoretical importance.

It results from the foregoing that the existing law upon

Recapitulation.

this subject is not capable of being embodied in one consistent statement. Apart from the doubts which must of necessity arise concerning the practical effect of a statute in the very curious position of the fourth section of the Statute of Monopolies it is plain that there is some disconformity between the law as laid down in the old Act and as formulated and elaborated in recent decisions and in the Act of 1883. Indeed, when regard is had to the widely different point of view from which the older and more recent authorities have approached the topic, the wonder is that the disconformity should not be greater than it is. But no good could at present result from an attempt to attenuate it. In the present state of the authorities it must of necessity be left to the Courts to ascertain the law; until that has been done the utmost assistance that a writer on the subject can hope to render is to draw attention to the forgotten statutes and to offer, in the form of commentary and synopsis, such contributions as it may be in his power to make toward the elucidation of difficulties.

## CHAPTER II.

## THE STATUTE OF MONOPOLIES.

IN the preceding chapter the influences have been traced which gave occasion for the Statute of Monopolies and impressed upon it the particular form in which it made its appearance. Two cases are referred to by Sir Edward Coke as having been “principal motives of the publishing of the King’s Book,” namely, the Case of Monopolies (*a*) and the Case of Penal Statutes (*b*). The reports of these cases, being now not altogether easy of access, have been reprinted in the Appendix of this book (*c*). A comparison of the language of the Book of Bounty with the reported decisions abundantly bears out Sir Edward Coke’s statement.

The king having once been induced to give a solemn recognition to these formal statements of the common law had placed in the hands of Parliament the most effective of all arguments in favour of the passing the Statute of Monopolies; most effective, that is to say, with a person of the temper of James I., namely, the *argumentum ad hominem*. The Statute of Monopolies itself wears this form, and may be summarised to the following effect:—

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Your Majesty, in 1610, published such and such a declaration.</li> <li>2. Such declaration is truly consonant to the ancient and fundamental laws of this realm.</li> </ol> | Synopsis of<br>the Statute<br>of Mono-<br>polies.<br>See below,<br>p. 67. |
|---|---|

(*a*) 3 Inst. 182.(*b*) 3 Inst. 187.(*c*) See below, App. I. p. 161.

3. Your Majesty expressly forbade suitors to presume to move your Majesty in reference to certain matters in the declaration mentioned.
4. Yet, notwithstanding that declaration and prohibition, many such suits have been put forward upon false pretences and successfully.

Therefore let it be enacted :

Thereupon follow a number of enactments conceived, as to the leading provision of all, in the very terms of the King's Book and, as to the rest, upon the notion of rendering the declaration effectual to suppress the evil at which it was aimed.

The King's Book upon which so much, both in connection with the origin and interpretation of this statute, turns, has by a singular fortune dropped, since the days of Sir Edward Coke, almost completely out of sight.

The Book of  
Bounty.  
See below,  
p. 157.

The book is not to be found among the collected works of King James, nor is it in the Fœdera, the State Papers, Clarendon, the Somers' Collection or, so far as I have been able to discover, in any of the various collections to which a way can be found by the aid of bibliographies. The cursory references in Coke and the very vague allusion in the preamble of the Statute of Monopolies are all the materials for identification that now remain and only the industry of book collectors has preserved the few copies which still survive. Of these, the British Museum possesses three copies, two bearing date 1610, the other 1619. One of these I am able, by the courteous permission of the Museum authorities, to place before the reader in the form of a photographic facsimile (*d*), and thus to complete the materials with which a student of the Statute of Monopolies may approach his task.

21 Jac. 1, c. 3. An Act concerning Monopolies and Dis-  
pensations with Penal Laws and the Forfeiture  
thereof.

Forasmuch as your most excellent majesty in your royal judgment and of your blessed disposition to the weal and quiet of your subjects, did, in the year of our Lord God 1610,

publish in print to the whole realm and to all posterity, that Preamble.  
all grants of monopolies and of the benefit of any penal laws, or of power to dispense with the law, or to compound for the forfeiture, are contrary to your majesty's laws, which your majesty's declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm: And whereas your majesty was further graciously pleased expressly to command that no suitor should presume to move your majesty for matters of that nature;

The reference here is to the Book of Bounty; republished in the Appendix to this volume (e).

yet nevertheless upon misinformations and untrue pretences of public good, many such grants have been unduly obtained and unlawfully put in execution, to the great grievance and inconvenience of your majesty's subjects, contrary to the laws of this your realm, and contrary to your majesty's royal and blessed intention so published as aforesaid: For avoiding whereof and preventing of the like in time to come, may it please your most excellent majesty at the humble suit of the lords spiritual and temporal and the commons in this present Parliament assembled, that it may be declared and enacted, and be it declared and enacted by the authority of this present Parliament, that

The declaration which follows is somewhat intricate and it may be convenient to the reader to have it exhibited in a tabular form. The declaration is threefold; that is to say, that the following things are—

- (1) "altogether contrary to the laws of this realm";
- (2) "are and shall be utterly void and of none effect";
- (3) "in no wise to be put in ure or execution."

(e) See below, p. 157.





It will be observed that the four classes of mischiefs here struck at constitute a double system springing from the twin abuses of monopoly and dispensing power.

*First.* Monopolies;

*Second.* The instruments by which monopolies are created;

*Third.* Abuses of the dispensing power;

*Fourth.* The administrative Acts by which the Government could interfere with the course of justice in aid of patentees or grantees of the power of dispensation.

The two evils are attacked—

1. Directly; by a declaration that they are “altogether contrary to the laws of this realm,” *i.e.*, *mala in se* (*f*), utterly void and of none effect and nowise to be put in ure or execution.
2. Indirectly; by declarations striking at the instrumentalities by which they are called into existence and maintained.

This alone might fairly be considered sufficient to eradicate the evil but the Legislature, not content to leave the matter there, has supplemented it with three other provisions designed to secure the same end. Thus, section 2 gives exclusive jurisdiction to the Courts of Common Law, section 3 disables all persons to hold or benefit by monopolies and section 4 penalises any attempt to give effect to them. Not without reason has Sir Edward Coke observed that this Act “is forcibly and vehemently penned for the suppression of all monopolies” (*g*).

## all monopolies and

It is noteworthy that the word “monopolies” is used in this statute without synonym or paraphrase and this is the more remarkable because amplification for the purpose of closing every conceivable door upon evasion or misunderstanding of the Act is a conspicuous feature of the style. This is very manifest in the analysis of this section in tabular form given above (*h*) and the contrast afforded by the use of this word “monopolies” is therefore most suggestive. No doubt the reason is to be found in the fact, above noted, that this section of the Act is in substance taken from the Book of Bounty and that it was the object of the promoters of the Bill to follow as far as possible the king’s language in the enunciation of the law in order to give as little room as possible for cavilling on the king’s part and to take away from him motive and excuse for refusing the royal assent. Still, the use of the term

(*f*) 3 Inst. 181.

(*g*) 3 Inst. 182.

(*h*) See p. 24.

in this manner suggests, or indeed implies, that a perfectly definite meaning was attached to it.

*Definition of "Monopolies."*

The authorities upon this point are some of them ancient but not on that account obsolete since they are connected more or less closely with the very text which they are cited to expound.

*Davenant v. Hurdis.*  
See below,  
p. 206.

There is first the case of *Davenant v. Hurdis* (*i*), tried in the Court of Queen's Bench in Trinity Term, 1599, where it was held that "every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly." And in the same case, the word "monopoly" is interpreted by its derivation as follows:—"Monopolium dicitur ἐπὶ τοῦ μόνου καὶ πωλέω, quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens." And the poet saith "Omnia Castor emit, sic fit ut omnia vendat."

Book of  
Bounty.  
See pp. 13 and  
21.

The next authority is the Book of Bounty itself, published in 1610, where the word is used clearly with a definite meaning and one, moreover, which is contrasted with patent rights granted for new inventions (*j*).

In Parlia-  
ment.

The word is constantly met with, about this time, in the Proceedings of Parliament, and when it is next met with in the Reports, it is used with greater freedom and familiarity. Thus in the *Ipswich Taylors' case* (*k*), which was tried in 1613, it was held "that at the common law no man could be prohibited from working in any lawful trade, for the law abhors idleness . . . . and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade and that appears in 2 H. 5, 5 B.: A dyer was bound that he should not use the dyer's craft for two years (*l*), and there Hull held that the bond was against the common law, and, by G—d, if the plaintiff was here he should go to prison till he paid a fine to the king."

*Ipswich  
Taylors' case.*  
See p. 117.

Sir Edward  
Coke's defi-  
nition.

These authorities are before the statute. Of later date we have, first, the formal definition given by Sir Edward Coke in his third Institute (*m*) in commentary upon this section. There he says: "A monopoly is an institution or allowance by the king by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing whereby any person or persons,

(*i*) Moore, K. B. 576; 11 Co. Rep. 86.

(*k*) 11 Co. Rep. 53.

(*j*) Book of Bounty, p. 13, and p. 21; see below, pp. 173, 181.

(*l*) The Year Book says half a year.

(*m*) 3 Inst. 181.



bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."

Great weight would, in any case, attach to a dictum of this nature by Sir Edward Coke; but it cannot be uninteresting to remark, as has been previously pointed out that Sir Edward Coke was himself the chairman of the committee of the House of Commons to which the bill was referred which afterwards became the Statute of Monopolies (*n*).

A long interval of time separates these authorities from the next, *Boulton v. Bull*, which is to be found in the judgment in *Boulton v. Bull* (*o*). There Eyre, C. J., says: "Deriving so little assistance from our books, let us resort to the statute itself, 21 Jac. I. c. 3. We shall there find a monopoly defined to be the privilege of the sole buying, selling, making, working, or using any thing within this realm."

**all commissions grants licences charters and letters patents  
... of or for the sole buying, &c.**

This list of instruments by which monopolies could be created was, no doubt, intended to be exhaustive and upon a careful examination it appears so to be, subject to the condition that the kind of monopoly here contemplated was only such as had received the sanction of the Crown. In the case of *John, the dyer* already referred to (*p*), Sir John Hull seems to have thought that a bond given by one private person to another when put in execution by the obligee might become a monopoly but it probably will not be contended that any such contracts in restraint of trade, however vicious in the eye of the law, are contemplated in this section.

Taking only the case then of monopolies originating in the act of the sovereign, that act must be authenticated by the Great Seal or now, by virtue of the Patent Act (*q*), by the seal of the Patent Office. So strictly was this rule observed in ancient times that the accounts of the king's butler, Fulham, were disallowed in the time of Edward III. in respect of certain parcels of wines given by the king to certain persons by word of mouth without writing (*r*).

Grants, how made.  
See below,  
p. 132.

(*n*) Commons Jl. 26 Feby. 1623. I have lost, and cannot now recover, the reference to the writer who has mentioned this circumstance.

(*o*) 2 H. Bl. 463, see p. 491.

(*p*) Year Book, 2 H. 5, 5 B. (26);

and see 11 Co. Rep. 53. See also preceding page.

(*q*) 46 & 47 Vict. c. 57, s. 12, sub-s. (2).

(*r*) Close Roll, 4 Edw. 3, m. 19. See also Vin. Ab. Tit. Prærogative of King (C. b.) 1 and (Z. c.) 4.

Grants how made.

We are thus able to enumerate the classes of instruments which satisfy the requirements of the case. They fall under three categories—1. Close writs; 2. Letters patent; 3. Charters (s).

This, however, is a modern classification and although the references to letters patent and charters suggest this principle of classification it does not appear to have been in the draughtsman's mind for there is no allusion to the remaining category of close writs. Whether close writs were ever used for the creation of monopolies may be doubted. The description of the Close Roll prefixed to the first volume as printed by the Record Commission does not suggest that it contains any instances. The probability is that close writs were not so used for they were directed to individuals not to all into whose hands they should come and were, therefore, quite unsuitable in point of form for creating an obligation which should bind the public at large. Be the fact as it may, they are not mentioned in this place, for the first three categories—commission, grant and licence—will cover open writs as well as close. In point of fact, we have cross-divisions here. The first three categories contemplate only the substance of the incriminated instrument, the last two only its form.

### all commissions

Commissions.

It is probable that commissions were sometimes issued for the purpose of creating monopolies in the king's name. Sir E. Coke's definition of a monopoly as "an institution or allowance by the king by his grant, *commission* or otherwise," &c., seems to imply so much. But they were probably never common and certainly are not now easy to discover. More than one commission issued by King James relating to the sale of the queen's jewels and such like matters is to be found in the *Fœdera* (t). But these, of course, do not in any sense tend to monopoly. The nearest thing to a monopoly created by commission that I have been able to discover is a special commission to seek for treasure trove (u). But in this case, the treasure belonging to the Crown by virtue of the prerogative, the commission did not tend to abridge any existing trading or industrial rights. It invaded the property of the subject only by conferring powers of entry and search which, however inconsistent with individual liberty, trench upon rights of a different nature from the liberty to work and carry on trade, which the monopolist attacks.

(s) 1 Rol. Pat. 1.

(t) See *Commissione Speciali* . . .  
concernente jocalia: Ry. 17 Fœd.  
138, and, *De Commissione Speciali*

. . . pro venditione gemmarum:  
Ry. 17 Fœd. 176.

(u) Ry. 17 Fœd. 101. See also  
fo. 12.

Probably the reason why monopolists did not much affect commissions was that the commissioner, acting not in his own name but in the name of the Crown, was held more strictly accountable for his mode of executing his commission and for its pecuniary fruits than was agreeable and for that reason much preferred to take his benefit in the form of a grant than of a commission. Commissions furthering a monopoly by creating a special Court to take cognizance of infringements are extinct. Two such have been published by Dr. S. R. Gardiner (*v*). But they do not strictly answer to the description in the Statute of Commissions for sole buying, &c.

### grants

The grant of a monopoly needs no illustration. But it may be pointed out that the word as here used denotes the substance and not merely the form of the transaction: that is to say, the word is not to be understood as meaning a conveyance made or power conferred by specialty as against some less solemn procedure; but, on the contrary, as indicating a transaction by which the donee takes an interest and not merely an authority. It stands thus in due contrast with "*commission*." If it were understood in the special sense denoting a sealed deed it would be pointless for it has never been suggested that the Crown could create a monopoly otherwise than by a deed under seal.

### licences

Trading charters have very commonly taken the form of Royal licences to trade the object of the licence being to avoid some law imposing disability upon the trader. Thus, in the case of foreign trade, it was held, in the *E. India Co. v. Sandys* (*x*), that all such trade was prohibited to the king's subjects except so far as it had been "opened" by Act of Parliament or licensed by the king.

So also a Statute of Elizabeth (*y*) prohibited the use of any manual occupation except to persons who had undergone apprenticeship thereto, a disability from which it must have been very important for the early inventors to obtain dispensation since in many towns throughout England there were, and indeed still are, chartered guilds of merchants and craftsmen whose privileges at the date of the Statute of Monopolies were effective and jealously guarded. On this account royal licences were sought by those who

(*v*) See 41 Arch. pp. 251 and 256.

(*y*) 5 Eliz. c. 4, s. 24

(*x*) Skin. 223.

**Licences.** desired to set up new industries in order to countervail the earlier patents (z).

**To excuse nuisance.** Another purpose for which the royal licence appears to have been given is that of enabling the licensee to set up a nuisance, in the form of a noxious trade, to the annoyance of his neighbours (a).

### charters

**Charters.** A charter is an open writ (letters patent) and differs from mere letters patents in this respect that it emanates not from the king alone but from the king and Privy Council. It is, indeed, analogous to an Act of Parliament, the difference between the two being that, whereas the Act is passed by the king in Parliament, the charter is passed by the king in Council (b). Monopolies created by charter are too familiar to require illustration by examples. Such monopolies are always conferred upon the "chartered companies," but are not within the purview of this statute because they do not confer an exclusive right to be exercised within "this kingdom or the dominion of Wales."

### letters patent

**Patents.** Here again we are on familiar ground. Letters patent, strictly so called—that is to say, open writs emanating from the king alone, not from the king in Council—are peculiarly apt for the creation of monopolies or any other privilege because, being authorized by the sign manual or privy seal merely, they do not necessarily come into discussion before the Privy Council and, according to ancient practice, the language in which they are expressed is variable to suit various occasions and can therefore be adapted to the requirements, whatever they may be, of an individual case.

heretofore made or granted, or hereafter to be made or granted to any person or persons bodies politic or corporate whatsoever of or for the sole buying selling making working or using

Sir Ed. Coke observes (c) that the word "sole" in this clause is applied to five several things four of which are special and the last (viz., sole using) is so general as no monopoly can be raised

(z) See Mansell's Glass Patent, 1 W. P. C. 20, 21. See also the dispute between the Brown Bread Bakers and the White Bread Bakers, Rememb. 92.

(a) Rememb. 94.

(b) 2 Inst. 77, 78.

(c) 3 Inst. 182.

but shall be within the reach of this statute. This, as bearing upon the construction of the word "using" in this place, is a very important observation, regard being had to its authorship, but it is, perhaps, even more important for the interpretation of the statute as a whole, to observe that these "five things" fall into two clearly distinguishable groups. Two of them—that is to say, "buying" and "selling"—relate to commerce, or the industry of distribution; the remaining three relate to manufacture, or the industry of production. The distinction is not unimportant but its bearing is on general patent law rather than on the special subject of this book, and therefore it must not be pursued here.

### of any thing

Upon this expression Sir E. Coke's comment is (d), "As the words before were general so these words [of any thing] are of large extent. *Res enim generalem habet significationem quia tam corporea quam incorporea, cujuscunque sunt generis, naturæ sive speciei, comprehendit.*" Apart from the authority of the writer, this observation would not be very convincing for it must surely be easier to deduce from the context the exact shade of meaning which, in any particular instance, attaches to a familiar word than from an abstract definition of its Latin synonym. And indeed it may be doubted whether even Sir Ed. Coke's authority will suffice to fix upon this word in this place the unrestricted significance which he here attributes to it for the difficulty of so doing may well be regarded as insuperable. An instance will make this plain. If the word "thing" covers "incorporeal things of whatever kind, nature, or species," it must include leases and possession under a lease. Does the provision that "all letters patent . . . for the sole using of anything within this realm are and shall be utterly void and of none effect" make leases from the Crown invalid? The lessee undoubtedly has the sole use of the land and has it by virtue of the patent, yet it needs no argument to show that Crown leases are not within the purview of the Act. So obvious indeed is this, that, notwithstanding the exact and careful drafting of the statute there is no saving of such leases or of other grants made by letters patent which were in similar case. Nor can this omission be attributed to mere inadvertence. In the same session of Parliament an Act was passed for the relief of patentees, tenants and farmers of Crown lands in cases of forfeiture (e). The case put is therefore by no means fanciful or far-fetched. The precarious

Sir Edw.  
Coke's defi-  
nition.

(d) 3 Inst. 182.

(e) 21 Ja. 1, c. 25.



nature of title to land derived by patent from the Crown was one of the grievances which the Parliament was at this very time going about to redress. Is it conceivable that the draughtsman of this statute, who was certainly a most accomplished master of the art of draughtsmanship, could have used words apt to destroy the title of these very tenants of the Crown without adding a saving clause to protect them?

The definition  
reconsidered.

Fortified by such considerations, I shall make bold to examine anew the question, What does "any thing" in this place denote? and with great diffidence to submit that the key to its meaning is given by the instance just alluded to. It is manifest that the grant of a sole user by lease is unobjectionable because such a grant does not *create* a monopoly. The tenement was *monopolised* before—if the word monopoly may be properly used in this sense. The lease only transfers to the lessee the right of sole user which already existed in the hands of the lessor. Now it is the privation of the public of subsisting rights by means of royal grants which the statute is designed to prevent and therefore the mere passing of undisputed rights from one to another, however effectuated, does not fall within the mischief. This may be collected from the preamble, where the "quiet of your subjects" is assigned as the king's purpose in publishing his book and, by implication, as the object of the legislature in enacting this law. It cannot, therefore, be intended to bring undisputed titles into question. The same may also be inferred from the scope of the declaration itself now under discussion as illustrated by the general words with which it draws to its conclusion:—"All other matters or things whatsoever any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them." "Instituting" is the key-note of this phrase and nothing akin to "conveying" finds any place there.

Finally, the same inference might be drawn from the character of the ancillary provisions enacted in the fourth, fifth, sixth, and some other sections of the Act, if the proof were not sufficiently, or even superabundantly, laboured in what has been already said.

Assuming, then, that this point has been made good, it will be convenient to recur to the statute and inquire concerning the provision that "all . . . letters patents for the sole . . . using of anything within this realm . . . shall be utterly void:"—How can it be read with the necessary limitations? Now this may be done without violence to the text by putting a reasonable construction on the meaning of the word "thing." This word, notwithstanding its vast comprehensiveness, indeed, by reason of it, always takes a



colour from its surroundings. "Anything to the contrary" was never known to denote a corporeal substance, and instances to the like effect might be multiplied without end. There is therefore no literary impropriety involved in breaking away from the control of Sir Edward Coke's dictum in this place, and contending that "thing" here comprehends only things of such character and so circumstanced as to be liable to become by reason of the incriminated patent subject-matter of some new monopoly.

**within this realm or the dominion of Wales,**

"This realm" is, of course, England, a point which must not be lost sight of in discussing the remedies given by this statute. It will be considered more at large in a later chapter (*f*). Geographical limit.

**or of any other monopolies,**

It may be noted that the use of the preposition "of" in this place, in contrast with "of or for" in connection with the "sole buying," &c., limits the context in the opening phrase to the two words "grants" and "charters." It would seem that the single word "grants" conveys the whole meaning. It is not apparent what other monopolies can have been in contemplation. Probably the phrase was introduced only in case some new thing of this description should be invented in later times and so to provide against something unknown and unforeseen.

**or of power liberty or faculty to dispense with any others**

These words introduce the second subject, namely, dispensations struck at by this declaration. They are not to be considered merely as ancillary to the creation of monopolies, or mischievous for that reason only. It may, on the contrary, be noted that the title of the Act puts dispensations on the same footing as monopolies, reading as follows: "An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeiture thereof." The present phrase therefore deals with the second subject concerning which the statute was made. But although grants of the dispensing power constituted an independent grievance, they were also in fact subservient to the creation of monopolies, as the judgment in the *Case of Monopolies* suffices to show (*g*). The connection between the two things is therefore very intimate, since they are not only closely similar in origin and mischievous effect, but also adapted to serve the one to the institution and maintenance of the other. Dispensations.

(*f*) See p. 126.

see also App. IV. p. 263.

(*g*) See below, App. II. p. 230 ;

to dispense with any others

This idiom is now entirely obsolete, but it found a place in the earlier editions of Johnson's Dictionary. The Doctor interprets it as signifying to set free from an obligation, and observes: "This construction seems ungrammatical." He cites, by way of illustration, the following phrase from Addison: "I could not dispense with myself from making a voyage to Capua" (*h*).

or to give licence or toleration to do use or exercise any-  
thing against the tenor or purport of any law or statute,

In this way the dispensing power was manipulated to confer monopolies. A grant of some portion of the dispensing power was made to a subject, who exploited it for his own profit by selling indulgences.

Dispensing  
power in the  
hands of the  
king, and of  
a subject.  
See App. II.  
pp. 230, 232.

This topic has now a purely antiquarian interest and must not therefore be pursued in this place. But it is worthy of remark that the abuse aimed at in this section was not the now exploded doctrine of a dispensing power in the hands of the king. This the ablest and most independent common lawyers recognized at that date. But not content with claiming the dispensing power as a branch of the prerogative, Elizabeth and the Stuarts claimed the power to divide it up into parcels and bestow it upon their suitors. It was this enormity which the Statute of 1624 was passed to retrench (*i*).

or to give or make any warrant for any such dispensation  
licence or toleration to be had or made,

This was mere machinery by which the delegated dispensing power was exercised.

or to agree or compound with any others for any penalty or  
forfeitures limited by any statute, or of any grant or  
promise of the benefit profit or commodity of any for-  
feiture penalty or sum of money that is or shall be due  
by any statute before judgment thereupon had,

This relates only to the second purpose of the statute, and was not, so far as I have been able to discover, at any time used to buttress a monopoly.

(*h*) Johnson's Dictionary, 6th ed.  
1785, word "dispense."

(*i*) See the case of Penal Statutes,  
7 Co. Rep. 36, and below, p. 232.

## and all proclamations

These words introduce a new class of mischiefs, namely, instruments for promoting monopolies or dispensations. They were employed not usually to make title, but to facilitate the maintenance of the monopolists' claims. An instance of a proclamation issued in corroboration of a patent, is the proclamation made in aid of the Earl of Berkshire's patent for kilns(*k*), which, for convenience of reference, is printed in the Appendix(*l*). In the case of gold wire however King James attempted to create a monopoly by proclamation. The proclamation has been published *in extenso* by Dr. Gardiner(*m*). Proclamation.  
See App. IV.  
p. 262.

## inhibitions

An instance of an inhibition is to be found in the present form of a patent grant(*n*).

## restraints

The practice of issuing injunctions to restrain litigants from pursuing their remedies at common law has only recently ceased, and that by virtue of the Judicature Act, 1873(*o*). Even that statute did not touch the prerogative rights of the Crown(*p*), and it would, therefore, be rash to assume that this clause, avoiding all restraints, is even now obsolete. It is pointed out in the Institutes(*q*) that these words comprehend not only the Acts of the Crown but also of the Privy Council, or of any Privy Councillor or other person. The extent to which the magnates of the realm assumed to interfere with the course of justice in furtherance of their own interests and those of their clients in the age of monopolies may be gathered from the articles exhibited against Cardinal Wolsey, where amongst other things the following were laid to his charge:— Restraints by  
subjects.

That he had “examined divers and many matters in the Chancery after judgment thereof given at the common law . . . and made some persons restore again to the other party condemned that that they had in execution by virtue of the judgment at the common law(*r*). . . . Also when matters have been near at judgment by process at your common law, the same Lord Cardinal hath not only given and sent injunctions to the parties, but also sent for your(*s*) judges, and expressly by threats commanding them to defer the

(*k*) Ry. 20 Feod. 191.

(*l*) See below, App. IV. p. 262.

(*m*) See 41 Arch. 247 and 260.

(*n*) See below, p. 127.

(*o*) 36 & 37 Vict. c. 66, s. 24,

(*p*) *Att.-Gen. v. Constable*, 4 Ex. D. 174.

(*q*) 3 Inst. 182.

(*r*) Art. 20.

(*s*) *I.e.*, your Majesty's judges.

sub-s. 5.

judgment, to the evident subversion of your laws, if the judges would so have ceased (*t*). . . . Also he hath divers times given injunctions to your servants that have been for causes before him in the Star Chamber, that they, nor other for them, should make labour by any manner way, directly or indirectly, to your grace to obtain your grace's favour or pardon" (*u*). Moreover, in Articles 41 and 42, specific instances are given of the Cardinal's having proceeded in one case by writ of subpoena, and in the other by injunction, to oust the lawful possessors of tenements from their property without even the form of a trial. His proceedings seem to have been exorbitant, but not highly original. It is clear from contemporary documents that the Lords of the Council assumed large dispensing powers quite naturally at this date. Thus, the proclamations issued by James I. to encourage the fisheries by enforcing the prohibition of killing meat in Lent contain the following recital:—"It appeareth that the chiefest cause of these disorders hath grown from the licences that have been granted to butchers to kill and utter flesh contrary to law, and that it is plain that no mayor or other person of what degree or quality soever can grant any licence in this kind, and that the lords and others of our Privy Council do by our direction forbear to grant any such licence or to give way thereunto" (*x*).

#### warrants of assistance

Warrants of assistance.  
See App. IV.  
p. 264.

These are probably perfectly obsolete now. Illustrations of some of the forms in which these instruments were prepared are given in the Appendix (*y*).

and all other matters and things whatsoever any way  
tending to the instituting erecting strengthening fur-  
thering or countenancing of the same or any of them,

These words were probably added *ex abundanti cautelâ* rather than with respect to any specific mischief. At this place Sir Edward Coke observes (*z*), "This Act herein and in the residue thereof is forcibly and vehemently penned for the suppression of all monopolies, for monopolies in times past were ever without law but never without friends."

are altogether contrary to the laws of this realm,

Nature of the  
tort.

Therefore it is not *malum prohibitum* but *malum in se* (*a*).

(*t*) Art. 26.

also pp. 447, 528 and 661.

(*u*) Art. 37. See 4 Inst. 91 *et*  
*seq.*

(*y*) See below, p. 264.

(*z*) 3 Inst. 182.

(*x*) Ry. 17 Fœd. 131, 132. See

(*a*) 3 Inst. 181.

and in no wise to be put in ure or execution

This clause seems to go beyond the mere declaration of invalidity, and to prohibit the exercise of invalid powers. This provision of the statute has been entirely overlooked in those decisions which have asserted the right of a patentee to put even an invalid grant in ure and execution if he can do so *bonâ fide*. See the case of *Wren v. Weild*, and *Halsey v. Brotherhood* (b).

2. And be it further declared and enacted by the authority Second section.  
aforesaid, that all monopolies and all such commissions grants licences charters letters patents proclamations inhibitions restraints warrants of assistance and all other matters and things tending as aforesaid, and the force and validity of them and every of them ought to be, and shall be for ever hereafter examined heard tried and determined by and according to the common laws of this realm and not otherwise.

Sir Edward Coke, commenting upon this passage, says (c):— Triable by common law.  
“This Act . . . hath provided by this clause that they” (*i.e.*, Monopolies, &c.) “shall be examined, heard, tried and determined in the Courts of the Common Law according to the common law, and not at the Council Table, Star Chamber, Chancery, Exchequer Chamber, or any other Court of like nature,” &c. This commentary has now only an antiquarian interest so far as all the Courts enumerated (except the Court of Chancery) are concerned, which See p. 56.  
last is considered below.

But probably Sir Edward Coke, whose style is seldom fastidiously precise, intended to be understood as referring in this place to the Court of Chancery only when exercising its equitable jurisdiction. The Court of Chancery always was a Court of Common Law, as well as a Court of Equity (d). Indeed, its common law jurisdiction is its ordinary jurisdiction, and its equitable jurisdiction is extraordinary (e).

But there is nothing in the language of this section to exclude the ordinary jurisdiction of the Court of Chancery, and when the circumstances of the case are carefully considered, it seems quite certain that this jurisdiction was intentionally preserved. For, in the first place, it was a part of the common law jurisdiction of the

(b) See above, pp. 12—16.  
(c) 3 Inst. 133.

(d) Jud. Act, 1873, s. 16, sub-s. (1); 4 Inst. 79.  
(e) See 4 Inst. 79.



Lord Chancellor to hold plea of *sci. fa.* for repeal of the king's letters patents (*e*), and this jurisdiction is, in the nature of it, exclusively his, since if the patent be found invalid, he alone has power to cancel it—a function so high in point of jurisdiction in the estimation of our forefathers that the greatest officer of the Court took from it his title of *Cancellarius* (*f*).

*Scire facias.*

Accordingly, a *sci. fa.* to revoke a patent was always made returnable in Chancery and this was the established practice at the time of the passing of this Act. It is quite inconceivable that the Legislature intended by this section to abolish the practice and introduce some new procedure for trying the validity of a patent grant, for which no provision of any sort was made either at this time or since. The conclusion, therefore, seems irresistible that this passage in the Institutes must be read as referring only to the Chancery Court of Equity and not at all to its proceedings in *sci. fa.* for the repeal of a patent.

And it may here be noted, in order to make an end of this topic, that this exclusive jurisdiction of the Court of Chancery in a case of *sci. fa.* to repeal a patent has been continued in the Chancery Division of the High Court by the Judicature Act of 1873, which provides that there shall be assigned to the Chancery Division, *inter alia*, all causes or matters for the cancellation of deeds or other written instruments (*g*).

Jurisdiction  
of the Pala-  
tine Court.

It is, perhaps, worthy of consideration whether the existing Palatine Court of Lancaster has, under this section, jurisdiction to try a patent action. It may, no doubt, be said that the law administered by the Vice-Chancellor is the common law applicable to patents and therefore that his jurisdiction satisfies this section. That is probably true. But, prior to 1873, it is clear that, being common law matters, patents were within the jurisdiction of the Court of Common Pleas at Lancaster. That jurisdiction was, by the Judicature Act, 1873, s. 16, sub-s. 9, transferred to the High Court, and with it, apparently, the cognizance of questions of patent right arising in the County Palatine.

(*e*) Jud. Act, 1873, s. 16, sub-s. (1); 4 Inst. 79.

(*f*) 4 Inst. 88.

(*g*) Jud. Act, 1873, s. 34, sub-s.

(3). The reader who may desire

to ascertain the state of the law on this point before the Judicature Act, will find it very fully stated in Hindmarch on the Law of Patents, pp. 381 *et seq.*



3. And be it further enacted by the authority aforesaid, that Third section.  
all person and persons bodies politic and corporate  
whatsoever, which now are or hereafter shall be, shall  
stand and be disabled and incapable to have use exer-  
cise or put in ure any monopoly or any such commis-  
sion grant licence charters letters patents proclamation  
inhibition restraint warrant of assistance or other  
matter or thing tending as aforesaid, or any liberty  
power or faculty grounded or pretended to be ground-  
ed upon them or any of them.

This again cuts at the root of the modern doctrine of privilege Disability.  
attaching to invalid claims of patent right put forward *bonâ fide* (h).  
For it is manifest that no person can plead privilege to set up a claim  
which an Act of Parliament disables him from putting forward. It  
would seem that this section might usefully be pleaded, therefore,  
in a case within the exception of the thirty-second section of the Act  
of 1883 and in which the absence of special damage shuts out the  
fourth section of the Statute of Monopolies.

4. And be it further enacted by the authority aforesaid, that Fourth  
if any person or persons at any time after the end of section.  
forty days next after the end of this present session of  
Parliament, shall be

The session terminated on the 2nd Nov., 1624. It is not now  
necessary to plead the fulfilment of this condition (i).

hindered grieved disturbed or disquieted,

These words are manifestly chosen with the object of making the  
remedy given by this section very comprehensive, and they accord-  
ingly are words of large significance. It may be reasonably as-  
sumed that few, if any, abuses of patent right, or pretended patent  
right, will be found to escape through their meshes. But they are,  
nevertheless, words of definite meaning and therefore it is a matter  
of no small importance to ascertain how that meaning is illustrated  
by use and exposition. And as this is eminently one of those cases  
in which "*Contemporanea expositio est optima*," the authorities  
submitted in this connection will be as far as possible coeval with  
the statute.

(h) See *Wren v. Weild, Halsey v. Brotherhood*, above, pp. 12 *et seq.*

(i) *Rex v. Kilderby*, 1 Wms. Saund. 309b, n. 5.

## hindered

Statute of  
Jeofails.

The most accurate use of this word that I have been able to discover occurs in one of the Statutes of Jeofails(*k*), where the *hindrance* of the plaintiff is contrasted with the  *vexation* of the defendant. The preamble of that statute having set out the fact that the parties to actions and suits have been “greatly delayed and *hindered*” by reason of crafty, subtle, and negligent pleadings, proceeds that these things tend “to the great hurt delay and *hindrance* of the said plaintiffs or demandants or to the *vexation* of the defendants or tenants.” The idea which here is conspicuous, that a “hindrance” is an obstacle which the hindered party must needs surmount in the pursuit of some lawful purpose, is also present in the following examples of the use of the word.

Hindrance.  
Instances.

In 1636, the tobacco patentees complain to Charles I. that they are “hindered” by the competition of unlicensed persons(*l*).

In 1640, divers of the king’s “loving subjects” complain that they are “hindered” by the unlawful exercise of the prerogative(*m*), for giving a preference over other creditors to persons pretending to be debtors to the Crown.

The word receives a somewhat wider meaning in the following instances:—

In the Act against discontinuances of writs of error(*n*), the abating of appeals due to the absence of the Lord Chancellor and Lord Treasurer from Court on the appointed day of hearing is described as causing the hindrance of justice.

In a statute of the year 1623(*o*), the taking of usury is said to occasion “hindrance” to the Commonwealth.

In a patent of the year 1618(*p*), the word “hindrance” is used in a very vague sense to describe misconstructions of the grant tending to diminish the privilege granted.

Hindrance  
defined.

These instances establish, it is submitted, the point that the word as here used is used in precisely the same sense in which it would be used at the present day and covers a class of interferences with the rights of the individual sufficiently distinct but at the same time of large extent and in point of fact of a nature to include almost all attempts on the part of patentees to give effect to monopolies by imposing restraints upon the action of others.

(*k*) 32 Hen. 8, c. 30.

(*l*) Ry. 20 Fœd. 116.

(*m*) Ry. 20 Fœd. 401.

(*n*) 31 Eliz. c. 1, s. 1.

(*o*) 21 Ja. 1, c. 17.

(*p*) *Ramsey & Wildgoff's Patent*,  
Ry. 17 Fœd. 122.

## grieved

This word has been frequently made the subject of judicial consideration although not in connection with this enactment. There is, however, one very notable instance of its use to which preeminent value must be assigned by reason alike of the definite significance which is to be attributed to the word, the high authority by which it is used and the deliberate choice which stamps it for use in the given connection. This instance occurs in the definition of the functions of Parliament, which assembles according to a well-known formula "for the redress of grievances." This formula has now been consecrated by common use and was undoubtedly already in common use at the date of the Statute of Monopolies. Its solemn employment in a statute of the year 1640, passed to regulate the sittings of Parliament, has stamped it once for all as being the sufficient and authentic expression of the purposes for which the Parliament is convoked. As the statute has long been repealed, it may be convenient here to quote the phrase in which this clause occurs (*q*). "Whereas by the laws and statutes of this realm the Parliament ought to be holden at least once every year for the redress of grievances," &c.

Grievance.  
See below,  
p. 42.

16 Chas. 1,  
c. 1.

Another instance of the use of this word in the same sense, which is peculiarly apposite to the present discussion, occurs in the Lords' Remonstrance presented to Charles I. in the year 1640 (*r*).

Instances.

Taking particular examples, the following "grievances" may be instanced :—

Billeting of soldiers on inhabitants(*s*).

Extortion by the sheriff(*t*).

False affidavit leading to a writ(*u*).

The meaning of the word "aggrieved" has been very much discussed in the Courts, and principally in connection with the three subjects of Bankruptcy(*v*), Licensing(*w*), and Trade Marks. In all these cases the discussion has arisen about the meaning of the word, or of the phrase "aggrieved person" in an Act of Parliament, but it cannot be said that any conclusion has been reached which is of universal application. In one or two cases, however, the force of the words has been considered with a view to accuracy of definition and from this point of view especial importance must be attributed to the dictum of James, L. J., in the case of *Ex parte Sidebotham*(*x*). He there says, "But the words, 'person aggrieved' *Ex parte Sidebotham*.

(*q*) 16 Cha. 1, c. 1, s. 1.

(*r*) Ry. 20 Fœd. 435.

(*s*) Petition of Right, Chap. VI.

(*t*) 29 Eliz. c. 4.

(*u*) 21 Ja. 1, c. 8.

(*v*) 32 & 33 Vict. c. 71, s. 71.

(*w*) 35 & 36 Vict. c. 94, s. 52.

(*x*) 14 Ch. D. 465.

“Grievance” do not really mean a man who is disappointed of a benefit which instances. he might have received if some other order had been made. A ‘person aggrieved’ must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.” Similarly, Lord Watson, in the matter of *Powell’s Trade Mark* (y), referring to the use of the expression in sect. 90 of the Patents, Designs and Trade Marks Act, said, “Any trader is in the sense of the statute aggrieved whenever the registration of a particular trade mark operates in restraint of what otherwise would have been his legal rights.”

*Powell’s Trade Mark.*

*Reg. v. JJ. of Andover.*

*Ex parte Dillon.*

*In re Reed, Bowen & Co., Ex parte Official Receiver.*

The same result has in effect been reached in those decisions by which the meaning of the phrase has been restricted. Thus, in *The Queen v. JJ. of Andover* (z), it was held that the owner of licensed premises was not an aggrieved person in respect of the indorsement of a conviction upon the licence held by the occupier, because the owner’s interest was not directly affected by the decision in question. Again, in *Ex parte Dillon* (a), it was held, to substantially the same effect, that an “aggrieved person” must be a person aggrieved by the particular order complained of. Similarly, in *In re Reed, Bowen & Co., Ex parte The Official Receiver* (b), in which the majority of the Court of Appeal held that the official receiver was an “aggrieved person” because a decision had been given against him touching a matter in respect of which he was entitled to put a case before the Court, Fry, L.J., dissented, upon the ground that the official receiver had no interest in the decision, but was *functus officio* as soon as he had performed the duty of placing the Court in possession of his case and argument.

Grievance defined.  
See pp. 41, 84.

Upon a comparison of these various decisions, one point comes out with great clearness. It is plain that the man who has an interest which is immediately and adversely affected is an aggrieved person. This position has never been doubted. It may perhaps be contended, on the authority of the majority of the Court in *Ex parte Sidebotham*, that it is not necessary that the aggrieved person should be beneficially interested. If he *represents* an interest, it is sufficient (c). There must be an interest attacked,

(y) 11 R. P. C., p. 8.

(z) 16 Q. B. D. 711.

(a) 11 Ch. D. 56.

(b) 19 Q. B. D. 174.

(c) 14 Ch. D. 465. See the observations of the M. R. upon this decision in *Ex parte The Official*

*Receiver*, 19 Q. B. D. 178. The following cases may also be mentioned in this connection:—*In re Payne, Ex parte Castle Mail Packets Co.*, 18 Q. B. D. 154, Bankruptcy Act; *Ralph’s Trade Mark*, 25 Ch. D. 194; *Garrett v. JJ. of Marylebone*,



and not merely an interest prejudiced by an attack upon other interests with which it may be more or less loosely bound up.

### disturbed

The words "hindered" and "grieved," which precede this word Disturbance in the clause, point probably to acts of oppression in which there is at least apparently an interference with the legal rights of the aggrieved person. This word "disturbed" would seem to have an ampler meaning, and to include cases in which the amenities of existence, rather than legal rights of the aggrieved individual, are the object of attack. And it may fairly be conjectured that the power of search, with which it was the common practice to arm the patentees of the Tudors and the Stuarts, was the principal source of the annoyance which this word was intended to convey. That the word "disturb" does not connote any invasion of a right, is shown by its use in an Act concerning forcible entries, passed in the year 1588 (*d*), in which, after reciting that certain of the queen's good and loving subjects, who have acquired a good title by possession to tenements, have had "entries" (*i.e.*, unlawful entries) "made upon their possessions," and have been proceeded against by indictment of forcible entry, "for disturbing of such entrors." The Act then proceeds to remedy this mischief by a declaration that restitution given upon an allegation of forcible entry in such circumstances is not according to law, and to make suitable enactments to prevent its occurrence in future. Taking the word disturbance in this wide sense, we may find a particular reason for its use here in the power of search already alluded to. The power was given in a very formidable form, as may be seen from any contemporary patent for a monopoly (*e*). That it was often used to the great disturbance and inconvenience of the party upon whom the visitation was made can be well understood. Yet although so seriously inconvenient, a search being made under colour of a royal grant and warrant was no tort and therefore no grievance. The word "disturbance," therefore, which does not connote a tort or a damage even in the shape of hindrance was necessary to cover this case and cases like it. of trespassers. Disturbance defined.

### disquieted

This word bears a meaning very like to that of disturbance but Disquieted

12 Q. B. D. 620, Licensing Acts; Bankruptcy Act.  
*In re Trade Mark of the Soc. Anon.*, (d) 31 Eliz. c. 11.  
 (1894) 1 Ch. 61; (1894) 2 Ch. 26; (e) See, for example, *Gilbert's*  
*In re Lamb*, (1894) 2 Q. B. 805, Patent, App. IV., p. 249.

by theological  
discussion.

“Quiet,” by  
limitation of  
Crown suits.

Disquieted by  
common  
informers,

by limitation  
of actions.

The sheriff’s  
quietus.

Petition of  
Right.

makes allusion, perhaps, in particular to disturbance by process of law. This is, of course, a result of use and wont, not of definition, and indeed it would not be difficult to produce contemporary examples of its employment in a sense which has no reference to litigious proceedings. Thus, for example, in the Archbishop of Canterbury’s report to the king for the year 1637, the people of Bristol are said to be “disquieted” by theological discussion (*f*); and no doubt many such examples could be found with a little diligence. Nevertheless, its use, and especially in legal documents, is often pointed at disturbance by litigation. Thus, in a statute made in this same Parliament for limiting Crown suits, the object of the limitation is stated to be the “general quiet of the subject” (*g*). Similarly, in a statute of the year 1589 for suppressing the evil of blackmailing actions by common informers (*h*), the mischief is described thus: “Divers of the Queen’s Majesty’s subjects be daily unjustly vexed and disquieted by divers common informers upon penal statutes.”

Similarly, the original Statute of Limitations (*i*) is declared to be passed for the “quieting of men’s estates.” By another statute of this same Parliament (*k*), the sheriff’s “quietus est” is to be a discharge from all legal liability for acts done by him in the discharge of his office. The word occurs twice in the Petition of Right (*l*). In the first place—Clause II.—the context is “many of them” (*i.e.*, your people), “upon their refusal so to do” (*i.e.*, to contribute to a forced loan), “have had an oath administered to them not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance and give attendance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and *disquieted*.” In the second place—Clause X., which contains the prayer—a demand is made, *inter alia*, “that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or *disquieted* concerning the same or for refusal thereof.”

(*f*) Ry. 20 Fœd. 198.

(*g*) 21 Ja. 1, c. 2.

(*h*) 31 Eliz. c. 5.

(*i*) 21 Ja. 1, c. 16.

(*k*) 21 Ja. 1, c. 5.

(*l*) 3 Car. 1, c. 1 (precedes c. 1 in Ruffhead).



or his or their goods or chattels any way seized attached distrained taken carried away or detained by occasion or pretext of any monopoly, or of any such commission grant licence power liberty faculty letters patents proclamation inhibition restraint warrant of assistance or other matter or thing tending as aforesaid,

These words merit attention. The old patents purported to give the patentee, as has been already stated, power to seize infringing goods and it was, no doubt, the exercise of this power which was particularly contemplated in these words, as also in the use of the general word "disturbed"—and possibly the word "disquieted"—which precedes them. The power to seize is no longer included in a patent grant but, this notwithstanding, it is at the present day common form in pleading to ask for the delivery up of infringing goods as a part of the relief sought and the Courts do not shrink from granting this relief in certain cases (*m*). Seizure of goods.

This is, however, a comparatively recent innovation in practice, and it is not easy to discover on what principle it has been sanctioned. That such an innovation should not be admitted without good cause may surely be assumed when it is borne in mind that it is an ancient maxim of the common law that no forfeiture of goods can grow by letters patent (*n*), and that this maxim has been acted upon consistently from the date of Magna Charta (*o*) down to within the last thirty years. The history of the introduction and growth of the new practice is interesting and may be told in a few words. No forfeiture can grow by patent.

First, then, to get a date from which to start, it may be presumed that this practice had not been thought of prior to the year 1846. In that year Mr. Hindmarch's book on Patent Law was published, and in that book, although the remedies given to a patentee are discussed very fully, there is no hint that the Court could in any circumstances order the defendant's goods to be given up to the plaintiff (*p*). The case in Mr. Hindmarch's book nearest to those in which delivery up of infringing goods has been ordered in recent years is that of *Crossley v. Beverley* (*q*). In that case the patent was near its term and the infringer had manufactured a large stock Modern doctrine of forfeiture.

(*m*) *United Telephone Co. v. Walker and another*, 4 R. P. C. 64; see also p. 67; *Lancashire Expl. Co., Limited v. Roburite Expl. Co., Limited*, 12 R. P. C. 483.

(*n*) *Waltham v. Austin*, cited in the *City of London's case*, 8 Co. Rep. 125a, 127b; 2 Inst. 47; *Horne v.*

*Ivy*, 1 Sid. 441; 1 Vent. 47; *Hastings' Patent*, Noy, 183. See below, p. 220.

(*o*) Mag. Ca., ch. 29; and see Coke's commentary hereupon, 2 Inst. 47.

(*p*) Hindmarch, 251—366.

(*q*) 1 Russ. & Myl. 166.

Hindmarch.

*Crossley v. Beverley*.

Doctrine of  
forfeiture.

of infringing goods and held them in readiness to be put upon the market immediately after the expiration of the patent grant. Yet, even in this case, there was no question of delivering up or even of destroying the goods, and the order made was only a perpetual injunction to restrain the defendant from selling or disposing of any of the goods piratically made during the continuance of the patent. This order was made in the year 1829, but being cited by Mr. Hindmarch in 1846, may be taken to indicate the utmost length to which the Court would go at that date in the way of interfering with an infringer's rights of property in the infringing goods.

Norman.

The earliest authority that I have been able to find for the new doctrine is contained in Norman's New Law of Patents, published in 1853. The author of that little book says (s), "The articles manufactured and things used in the manufacture may be ordered to be given up and destroyed." For this statement he cites three authorities, namely, *Crossley v. Beverley* (t), already noticed, *Crossley v. Derby Gas Co.* (u), and *MacRae v. Holdsworth* (x). The first of these cases is, however, no authority for the proposition laid down, but, as has been already shown, is an authority against it in both its members. The second, *Crossley v. Derby Gas Co.*, is entirely off the point, and its citation is apparently due to a mere inadvertence. The third, *MacRae v. Holdsworth* (x), is a case under the Copyright of Designs Act of 1842 (y), and is therefore not at all in point. For there is no question that a forfeiture may accrue by Act of Parliament, and consequently the rules of law respecting the forfeiture of goods produced in contravention of a statute are wholly different from the rules applicable to a case of infringement only of a patent grant. Moreover, *MacRae v. Holdsworth* is not even an authority for the power to order the destruction of articles which infringe upon a statute, for the order was taken by consent, and as the result of a compromise between the parties. Mr. Norman appears to say, that both delivery up and destruction may be ordered; but possibly he should be understood to mean only that the infringing articles may be ordered to be given up *for the purpose of being destroyed*. Yet even so, it seems to be clear that he was mistaken in supposing this to be at that time the law in a case of patent grant.

Needham v.  
Oxley.

The next case in which the question arose appears to be that of *Needham v. Oxley* (z), tried in the year 1863; but this seems to have been argued upon the analogy of *The Emperor of Austria v.*

(s) At p. 189.

(t) 1 Russ. & Myl. 166.

(u) 3 Myl. & Cr. 428. But see  
1 Russ. & Myl. 166, and Erratum,

note above.

(x) 2 De G. & Sm. 496.

(y) 5 & 6 Vict. c. 100.

(z) 8 L. T. N. S. 604.

*Kossuth* (a), and it will be convenient therefore to notice that case in passing. In that case the plaintiff sought to restrain the defendant from producing notes purporting to be currency, and designed to circulate in Hungary, and to be used in promoting a revolution in that country. The rights in question were therefore as far removed as possible from patent right, and although in the end it was decided that the notes must be destroyed and the plates defaced from which they had been printed, the argument there does not throw any light whatever on the point now under discussion. Coming back, then, to the case of *Needham v. Oxley* (b), it is to be observed that here the relief asked for was that the infringing articles—the issue of infringement having been found by a jury in favour of the applicant—“might be *delivered up to be destroyed, or that the plaintiff might be allowed to purchase them for the value of the materials.*” This, therefore, represents at that date (1863) the high-water mark of professional opinion as to how far the Court could interfere with the property of a peccant defendant in his own goods, and the reference in this case to the far-fetched analogy of the *Emperor of Austria v. Kossuth*—the only authority cited—fully bears out the result of the foregoing investigation into the then existing state of the law upon this point. The Vice-Chancellor (Wood) did not grant the relief moved for, but adopted the less stringent course of directing that the plaintiff should be at liberty to place a mark on the infringing goods. The reason for his so deciding would seem to have been that the articles in question might be used so as not to infringe. Whatever the reason, the fact is that at this date the Court shrank from ordering the destruction of goods and a successful patentee did not even venture to propose the delivery of them up to himself except upon terms of purchase.

The earliest report in which which I have been able to find an order for destruction is *Betts v. De Vitre* (c), decided by Wood, V.-C., in 1864. In that case there seems to have been some confusion in the drawing up of the order. The hearing was concluded on the 3rd Dec., 1864, and the Vice-Chancellor then intimated that he would follow the precedent of the order made in *Hill v. Evans*. But there would seem to have existed some misapprehension as to the terms in which *Hill v. Evans* had been decided, for the case was mentioned in Court upon minutes on the 25th January following, and the order was then settled by the judge who, *inter alia*, directed an inquiry as to whether the defendants or any of them had in their

State of the law in 1863.

*Betts v. De Vitre.*

(a) 2 Giff. 628; and on appeal, 3 De G. F. & J. 217.

(b) 8 L. T. N. S. 604.

(c) 34 L. J. Ch. 291.

The first instance of forfeiture by patent.

possession or power any and what articles manufactured in violation of the plaintiff's patent and ordered that all articles which should be certified to have been so manufactured and to be in the possession of the defendants or any of them should be destroyed in the presence of the persons named, being the managers and solicitors of the plaintiffs. For this part of the order there does not appear to have been any authority in *Hill v. Evans* or anywhere else. The report of *Hill v. Evans* (*d*) in De Gex, Fisher and Jones, is quite explicit on the point. The Lord Chancellor there says:—"I grant the injunction and an account as prayed." He makes no reference to any forfeiture of goods.

It would seem then that this enormous jurisdiction to order the forfeiture of goods contrary to express and weighty authority and in defiance of the clearest constitutional doctrine can be traced no higher in its origin than to an order made, so far as appears, without argument, without consideration of the authorities or of the legal principles involved and upon an application to settle the terms of an order upon which no discussion of the substance was even likely to arise.

*Tangye v. Stott.*

Delivery up of goods.

The next case carries the doctrine a great step farther. In *Tangye v. Stott* (*e*), a prayer was introduced into the bill for "delivery up of the pulleys made in infringement of the patent," and the Vice-Chancellor (Wood) made the order "as prayed." The destruction of the goods ordered in *Betts v. De Vitre* might be regarded, perhaps, as a mandatory injunction and if it infringed no constitutional right of the defendant party it might, perhaps, be defended on that ground. But this order, divesting the defendant of his property and vesting it in the plaintiff, was not even sustainable upon any analogy to a rule of law and can only be supposed to have originated in the false analogy to pirated copies of a copyright work. This analogy seems, as has been above pointed out (*f*), to have misled Mr. Norman. It cannot, indeed, be said that this actually happened in *Tangye v. Stott*, for it does not appear from the reports that any argument was directed to the point. So little does it seem to have been brought to the minds of the persons present in the Court that a great departure was being taken, that of the two reporters who have placed the proceedings on record, one has wholly omitted to mention the order for delivery up and reports the decision concisely as a decree for a perpetual injunction and costs (*g*).

(*d*) 4 De G. F. & J. 309.

(*e*) 14 W. R. 386.

(*f*) See above, p. 46.

(*g*) See W. N. (1866), p. 68.



The point next arises in *Plimpton v. Malcolmson* in 1875 (*h*), and here it would seem that the power to order the destruction of infringing goods was for the second time asserted. But whether it was exercised upon the authority of *Betts v. De Vitre* does not at all appear. It does not indeed seem that any argument was directed to this point, or even that the point itself came at all under the notice of the Court in the course of the hearing. It is worth while to examine the reports of the case from this point of view. To take them in order:—The Law Reports give the reasoned judgment, but as the order of the Court was not to be drawn up until after a subsequent mention of the case, its provisions are not given in this report. The “Law Journal” and “Law Times” both give the effect of the order, but neither of them alludes to this direction about the delivery up and destruction of the infringing articles. To find this the inquirer must turn to “Seton on Judgments,” where the text of the order, as ultimately drawn up, is published in full. There appears in addition to clauses giving effect to the reported judgment a further clause in the following terms:—“And let the defendant forthwith upon oath deliver up to the plaintiff, or break up or otherwise render unfit for use, all roller skates or parts of roller skates so manufactured or let for hire by or by the order of or for the use of the defendant in infringement of the said letters patent as aforesaid, which are in the possession, custody or power of the defendant or his servants or agents.”

The case was heard in January, 1876, and the order was drawn up in the following March; so that it is at least conceivable that the Registrar, rather than the Master of the Rolls, should be credited with having added this weapon to the effective armoury of the Court of Chancery.

However the practice originated, it soon became established. In *Frearson v. Loe* (1878) (*i*) the same judge (Jessel, M. R.) made an order in similar terms, and in 1883 Pearson, J., made a similar order in *Badische Anilin v. Levinstein* (*k*) expressly upon the authority of *Plimpton v. Malcolmson*. *Frearson v. Loe*, and *Badische Anilin v. Levinstein*.

It should be observed, however, that so far as we have gone the Courts, save in the case of *Tangye v. Stott*, which appears to have been more or less overlooked in the later cases, have only assumed to order the destruction of infringing articles. The defendant had the option of delivering up or destroying his incriminated goods, so that there is no definitely recognized doctrine so far that the pro-

(*h*) 3 Ch. D. 531; 45 L. J. Ch. 505; 34 L. T. N. S. 340; Seton on Judgments, 5th ed., p. 565.

(*i*) 9 Ch. D. 67.  
(*k*) 24 Ch. D. 176.

perty in them may pass to the patentee. This point is clearly made in the last-cited judgment, *Badische Anilin v. Levinstein*.

But it would seem that already, at the date of *Frearson v. Loe* (1878), patentees were enlarging their pretensions although they had not yet received judicial recognition. Thus in *Vavasour v. Krupp* (1878) (l) counsel for the patentee contended that there was no property in shells made in infringement of a patent, for the Court would order them to be destroyed. This doctrine was, however, emphatically repudiated by the Court of Appeal. In giving judgment, the present Master of the Rolls said (m): "It is argued that if he," i.e., the Mikado, "were a private individual, then, although he has purchased these shells and paid for them, yet inasmuch as there has been an infringement of the patent the property is not in him, because the Court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The patent law has nothing to do with the property." And Cotton, L. J., at p. 360, says: "I think one argument was very much this, that if the foreign sovereign had been a private individual he could have had no property in these goods, because they were violations of the plaintiff's patent. . . . Now there, I venture to say, is a fallacy. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the property in them. The Court, in a suit to restrain the infringement of a patent, does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but assuming the property to be in him, it prevents the use of those articles either by removing that which constitutes the infringement or by ordering, if necessary, a destruction of the articles, so as to prevent them from being used in derogation of the plaintiff's rights, and does this as the most effectual mode of protecting the plaintiff's rights—not on the footing that there is no property in the defendants." Thus, in 1878, Sir Edward Coke's maxim, that no forfeiture can accrue by letters patent, was in substance restated by the Court of Appeal, though re-cast in respect of form and perhaps somewhat qualified in point of substance.

From this point, however, the development of the doctrine is rapid enough. Indeed, development is perhaps an inapt word to describe what happened, for when next it comes to light in the reports it is already fully developed. The case was *Washburn and Moen v. Patterson* (n), tried before Bacon, V.-C., in 1884. There

(l) 9 Ch. D. 354.

(m) See p. 357.

(n) 1 R. P. C. 162.



the order made was "a further order that the defendant should deliver up to the plaintiffs the infringing machines and such barbed wire as the defendant had manufactured by means of the infringing machines." This case, although it marks such a startling departure from the then existing practice, does not much assist the reader to discover the source of the new jurisdiction for the only reason assigned for granting this particular relief is that the plaintiff had asked for it. An appeal from this judgment was notified but not prosecuted.

It was little likely that the new weapon, when once forged, would be suffered long to lie by unused and in point of fact, instances of its use have greatly multiplied within the past few years and now a prayer for this form of relief has become common form of pleading in actions for infringement of patents. The reports, however, are nowise instructive as to the principle upon which the Courts have assumed this enormous power over an infringer's property. Strangely at variance as it is with all the traditions of the law and, with great humility be it added, with all sound principle, it has been over and over again asserted and in the most absolute terms and always without challenge during the past ten years. Thus in *The United Telephone Co. v. Walker* (1887) (o), there was an order directing an inquiry as to damages and delivery up of infringing instruments. Upon a review of the chief clerk's certificate, Chitty, J., said: "It was said by the defendants that there ought to be a set-off, as against these damages, of the value of the instruments which had been given up under the judgment. That appears to me to be absolutely untenable. The judgment is that those instruments should be delivered up, and the plaintiffs have not to pay for them in any form. That is one of the penalties which the patent law imposes on the infringer."

*United Tele-  
phone Co. v.  
Walker.*

Other examples might be quoted from the recent reports but they would serve no useful purpose for the doctrine in question has now been exhibited in its full proportions. Indeed it does not admit of any more peremptory statement than is found in the dictum just cited.

Such being the state of the law, or rather of the authorities, it is certainly a matter meriting consideration what rights a plaintiff would have under this provision of the Statute of Monopolies whose goods had been seized, carried away and detained by virtue of this new jurisdiction and under colour of a patent subsequently found to be invalid and, say, repealed. It is also a matter meriting

consideration in what circumstances, if at all, a successful plaintiff can be safely advised to seize and appropriate the property of the defendant under this new practice.

and will sue to be relieved in or for any of the premises, that then and in every such case the same person and persons shall and may have his and their remedy for the same at the common law, by any action or actions to be grounded upon this statute,

Therefore the statute must be pleaded (*p*). But it would seem that a merely formal defect in the pleading need not shut out the statute if the statutable remedy has actually been present to the minds of the parties, but may be remedied by an amendment made at the trial, or even then directed to be made (*q*).

Action on the statute.  
See pp. 12 and 96.

These words should be carefully considered in connection with any proceedings taken under this section. The whole subject, as has been already said, is entirely bare of authority, and therefore any observations which may here be put forward are made only by way of suggestion. But subject to this reservation it is conceived that this clause will be found very materially to affect the form and even the substance of any proceedings which may be taken under the section. The question of form will be separately discussed in connection with the subject of pleadings in an action (*r*) of this kind. The question of substance may be more conveniently considered here.

Remedial or penal statute.

In point of substance the main question that arises is, "Is this a penal or a remedial statute?" That the whole Act in its general scope is remedial admits of no doubt. It is made in furtherance of the common law (*s*) and for the purpose of giving relief to parties aggrieved (*t*) it gives no penalty to a common informer, but only to an injured party (*u*), and it may perhaps be considered to be made in furtherance of trade (*v*).

But although the statute, considered as a whole, is remedial, it does not follow that this particular enactment may not be considered to be penal (*w*), and it falls apparently within the definition

(*p*) *Wells v. Igulden*, 3 B. & C. 186; *Tuck v. Southern Counties Dep. Bank*, 42 Ch. D. 477.

(*q*) *Herrburger v. Squire*, 5 R. P. C. 589.

(*r*) See p. 143.

(*s*) Co. Lit. 76, a; *Heydon's Case*, 3 Co. Rep. 7, b.

(*t*) 2 Inst. 572; *Lord Huntingtower v. Gardiner*, 1 B. & C. 299; *Wil-*

*kinson v. Colley*, 5 Bur. 2698; *Fife v. Bousfield*, 2 D. & L. 481, 483.

(*u*) *Ward v. Snell*, 1 H. Bl. 13; *Rex v. Justices of York*, 1 Ad. & E. 834.

(*v*) *Milne v. Graham*, 1 B. & C. 192. See judgment of Denison, J., in *Rawlinson v. Stone*, 3 Wils. 4.

(*w*) *Hyde v. Cogan*, Doug. 705.

that a penal statute is a statute which imposes a penalty (*x*). It is even arguable that it creates the offence for which the penalty is given, for although a monopoly was a grievance at common law, as appears from the preamble of the Act and the declaration of the Book of Bounty, yet this is apparently something more than a new remedy for the old grievance. At least the action is to be "grounded upon this statute," and if that signifies, as well it may, that the statute is a part of the meritorious cause of action, then it is clear that the cause of action is something more than the common law grievance. The case may perhaps be illustrated by an analogy from the criminal law. Larceny by a bailee is a statutable felony but at common law it is not larceny at all but merely detainue. By the Larceny Act (*y*) the common law tort has become a statutable crime. So here the common law tort of monopoly has become a statutable grievance penalised by treble damages and double costs.

If this view be correct, it is not easy to deny that the action given by this section is a penal action and if the Courts are still disposed to follow the old rule that penal statutes must be strictly construed it may be that important consequences materially affecting the rights of the parties in the action will ensue.

But will the Courts now observe the old rules? The drift of recent authorities makes this doubtful although it may not be possible to cite a decision in which the old doctrine has been noticed to its discredit. But expressions like that of Lord Selborne in the *Caledonian Railway Co. v. North British Railway Co.*, show a tendency to assimilate statutes to other written documents, and put them all, as far as possible, under one comprehensive rule of construction in accordance with the grammatical sense:—"There is always some presumption in favour of the more simple and literal interpretation of the words of a statute or other written instrument" (*z*).

To the same effect is Lord Blackburn's dictum "... there is not much doubt about the general principle. Lord Wensleydale used to enunciate that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey v. Pearson* (*a*) in the following terms:—'I have been long and deeply impressed with the wisdom of the rule now, I believe, universally adopted at least in the Courts of Law in Westminster Hall, that in construing wills and

Penal statutes, how construed.

*Caledonian Rail. v. North British Railway.*

*Grey v. Pearson.*

(*x*) *Earl Spencer v. Swannell*, 3 M. & W. 163.

(*z*) 6 App. Cas. 121.

(*a*) 6 H. L. C. at p. 106.

(*y*) 24 & 25 Vict. c. 96, s. 3.

*Dudgeon v.  
Thomson.*

indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so far as to avoid that absurdity and inconsistency but no farther.' I agree in that completely" (b); and by Lord Cairns in *Dudgeon v. Thomson and another* (c), who there says, "There used to be a theory in this country that persons might infringe upon the equity of a statute."

*Hay v. Lord  
Provost of  
Perth.*

A mere comparison of these dicta with the numerous instances in which Lord Coke discusses the question whether a case within the letter of the law is within the meaning (d), and other niceties upon the construction of statutes (e), serve to show how widely divergent is the new point of view from that of earlier days. But perhaps the reconciling word is to be found in the dictum of Lord Westbury in *Hay v. The Lord Provost of Perth* (f), that "it was perfectly competent to the Courts in Scotland to extend their decision beyond the letter of the enactments, proceeding upon that which we are accustomed to call in England the equity of the statutes, a mode of interpretation very common with regard to our earlier statutes and very consistent with the principle and manner according to which Acts of Parliament were at that time framed." Having regard to the principle and manner of framing, the Statute of Monopolies can hardly be distinguished, save as excelling in the precision of its language, from the most modern legislation.

Upon the whole, therefore, it would seem that the Courts will probably apply the statute without straining either towards a benevolent or a strict construction, but following the grammatical sense and leaving to the Legislature any modifications of the severity of its provisions which may be necessary to bring it into harmony with modern views on the subject of the rights of pateutees.

21 Ja. 1,  
c. 4.

There is, however, another question beside the question of benignant or strict construction which is of great importance to litigants. By the Act 21 Jac. 1, c. 4 (An Act for the ease of the subject concerning the informations upon Penal Statutes), s. 4, it is provided that "if any information, suit or action shall be brought or exhibited against any person or persons for any offence com-

(b) 6 App. Cas. at p. 131.

(c) 3 App. Cas. 44.

(d) See, for example, 2 Inst. 106,  
110, 386, 427, &c.

(e) See, for example, 2 Inst. 152,  
242, 572, &c.

(f) 4 Macqueen, Sc. App. 544.

mitted or to be committed against the form of any penal law either by or on behalf of the king or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue that they are not guilty or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action, and the said matters shall be then as available to him or them to all intents and purposes as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action." The question is whether a monopoly is an offence against the fourth section of the Statute of Monopolies within this law and, if so, whether the fourth section is a penal law within the meaning of this clause.

It is not easy to believe that the legislature intended this to be the construction of the present clause. Indeed when it is borne in mind that these two statutes, the one relating to monopolies and the other to relief from the prosecution of penal laws, were passed in the same Parliament and are actually consecutive the one to the other upon the Statute Book, it is inconceivable that the one was intended to control and modify the operation of the other. Another consideration which makes for the same view is that it was so plainly the intention of the legislature to treat monopolists with severity that it cannot in reason be credited with a disposition to extend to them the privilege conferred by this section of the Act for the ease of the subject, and these two arguments are strongly corroborated by a third, which is furnished by Sir Edward Coke in his Commentary upon the Statute of Monopolies. He says that the reason of it "is notably expressed by the resolution of all the judges of England in the *Case of Penal Statutes*" (g), and to that case he gives a reference. Turning now to the *Case of Penal Statutes* (h) we find that the judges assign reasons why the Crown should not delegate the power of dispensing with penal laws to any subject, but the laws to which they refer are only penal laws upon which action can be brought by the king or by a common informer and as it was never pretended that the Crown could delegate or even exercise any dispensing power whatever in respect of remedies given only for the benefit of a party aggrieved, it is manifest that the expression "penal laws" in the Statute of Monopolies does not include the fourth section of that Act. Pointing to the same con-

General issue  
by statute.

*Case of Penal  
Statutes.*  
See below, p.  
232.

(g) 3 Inst. 186.

(h) 7 Co. Rep. 127, and App. II.  
p. 232.



clusion are the cases of *Bones v. Booth* (i) and *Wilkinson v. Colley* (k). Now we have only to assume that this technical expression bears one and the same meaning in chapter 3 and chapter 4 of the same Parliament to establish the position that the last-named statute does not include the Statute of Monopolies in the category of penal laws.

*Earl Spencer  
v. Swannell.*

These considerations are perhaps entitled to some weight, and might even have been considered to be decisive of the point in question, were it not for the decision in *Earl Spencer v. Swannell* (l), where Baron Parke held that a penal statute is one which imposes a penalty even although the action to which it gives rise be not barely penal.

Such being the state of the authorities, it is plain that the question whether the Statute of Monopolies is within this enactment must be considered at present a moot point. If it be within, the consequences relate chiefly to the course of litigation and will be worked out in detail in the Chapter upon "Procedure," which will be found at a later page (m). The reader who desires to consult a fuller and more systematic treatment of the subject here discussed may refer to Dwarrris on Statutes, Maxwell on the Interpretation of Statutes, and Wilberforce on Statute Law.

the same action and actions to be heard and determined in  
the Courts of King's Bench Common Pleas and Ex-  
chequer, or in any of them,

See above, p.  
37.

Authorities have already been cited to show that the Court of Chancery is a Court of Common Law (n), and now since the Judicature Act there is no such thing as a Court of Chancery and no such thing as a Court of Common Law. They are both combined in one (o). There is therefore apparently no reason why the remedy given by this section should not be pursued by way of counterclaim in a patent action in the Chancery Division. It may be that if brought as a separate action it ought to be assigned to the Queen's Bench Division, but this is not clear upon the Act (p), for although provision is made that business which before the Act was within the exclusive cognizance of any one of the Common Law

(i) 2 Wm. Bl. 1226.

(k) 5 Burr. 2698.

(l) 3 M. & W. 162.

(m) See below, p. 143.

(n) See above, p. 37.

(o) *Gt. Australian G. M. Co. v. Martin*, 5 Ch. D. 10; *Pinney v. Hunt*, 6 Ch. D. 100; *Salt v. Cooper*, 16 Ch. D. 549.

(p) Jud. Act, 1873, s. 34.



Courts should be assigned to the corresponding Division of the High Court, there is no disposition made of actions which, like this one, could formerly be brought in any one of the three Courts of Common Law indifferently. Upon analogy, however, it would clearly be right to carry such a complaint to the Queen's Bench Division. It seems clear that this action could not be brought in the Palatine Court even by way of counterclaim (*q*).

The Palatine Court.

against him or them by whom he or they shall be so hindred grieved disturbed or disquieted, or against him or them by whom his or their goods or chattels shall be so seized attached distrained taken carried away or detained,

This goes to show that the seizure contemplated by this Act is a seizure under the power contained in the patent, not a seizure by the sheriff under a writ of execution taken out by the patentee. For in the latter case the judgment would work an estoppel (*r*), and this rule was already established at the date of the statute (*s*).

wherein all and every such person and persons which shall be so hindred grieved disturbed or disquieted, or whose goods or chattels shall be so seized attached distrained taken or carried away or detained, shall recover three times so much as the damages which he or they sustained by means or occasion of being so hindred grieved disturbed or disquieted, or by means of having his or their goods or chattels seized attached distrained taken carried away or detained,

The rule for arriving at treble damages is to take the damages as found by the jury and multiply this sum by three (*t*).

### and double costs

By 5 & 6 Vict. c. 97, s. 2, these words are repealed, and instead of double costs that Act gives "such full and reasonable indemnity as to all costs, charges and expenses incurred in and about any action, suit or other legal proceeding as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner

See 5 & 6 Vict. c. 97, s. 2.

(*q*) Jud. Act, 1873, s. 16 (*q*).  
See above, p. 38.

(*r*) *Huffer v. Allen*, L. R. 2 Ex. 18.

(*s*) *Vernon's case*, 4 Co. Rep. 5.

(*t*) *Att.-Gen. v. Hatton*, 13 Pri. 477; *M'Clel.* 216; *Buckle v. Bewes*, 4 B. & C. 154.

and by the same authority as any other taxation of costs by such officer."

**Double costs.** This language is unusual, and even at the date of the Act the more familiar expression "costs as between solicitor and client" was in vogue. This is shown by an analogous provision in the Municipal Corporations Act, 1835 (*x*). What it gives is an indemnity in respect of costs (*y*), and this in some cases will amount to costs as between solicitor and client (*z*). If a case should arise in which the plaintiff can properly claim indemnity for something beyond solicitor and client costs, it may perhaps be held that the language of the Act (*a*) is not circumscribed by the rules as to costs between solicitor and client and on this point the analogy of the Municipal Corporations Act of 1835 (*x*) may be usefully considered. That section is framed upon the statute of James I. (*b*), which gives double costs to a constable whose conduct in his office is brought in question in any action if the plaintiff fails in the action. The Act of William IV. in an analogous case adopts the language of the Act of James, save only in this respect, that full costs as between attorney and client are substituted for double costs. In the subsequent Act of 5 & 6 of the Queen's reign the same intention to substitute a full indemnity in respect of costs for double costs is apparent but the ampler language may be well construed to import ampler relief at least in some perhaps unforeseen cases that may eventually fall within the more general provisions of the later Act.

These provisions as to costs are saved out of the section of the Judicature Act (*c*) which puts the costs of proceedings in the discretion of the Court or judge (*d*).

**Dilatory proceedings.** and in such suits, or for the staying or delaying thereof, no essoin protection wager of law aid prayer privilege injunction or order of restraint shall be in any wise prayed granted admitted or allowed, nor any more than one imparlance;

These matters tending to defeat or delay proceedings for enforcing the remedy given by the statute have for the most part become obsolete by reason of the changes which, since the passing of the Act, have taken place in legal procedure. It is curious to note,

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|--|---|
| ( <i>x</i> ) 5 & 6 Will. 4, c. 76, s. 133.   | ( <i>b</i> ) 7 Ja. 1, c. 5.   |
| ( <i>y</i> ) <i>Reeve v. Gibson</i> , (1891) 1 Q. B. 660.                          | ( <i>c</i> ) Jud. Act, 1890, s. 5.  |
| ( <i>z</i> ) <i>Re Wells and Croft, Ex parte Official Receiver</i> , 72 L. T. 361. | ( <i>d</i> ) <i>Hasker v. Wood</i> , 54 L. J. (Q. B.) 419; <i>Reeve v. Gibson</i> , (1891) 1 Q. B. 660. |
| ( <i>a</i> ) <i>i.e.</i> 5 & 6 Vict. c. 97, s. 2.                                  |   |

however, that though antiquated they are not for the more part yet formally abolished, and for this reason it will be proper to devote space to their separate discussion in this place.

### essoin

*Essoin*, *essonium*, or *exonium*, is derived from the French word *Essoin*. *essonier* or *exonier*, which signifieth to excuse, so as an *essoin* in legal understanding is an excuse of a default by reason of some impediment or disturbance (*e*). Our sturdy ancestors held it beneath the condition of a freeman to appear or to do any other act at the precise time appointed. The feudal law, therefore, always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing (*f*). But it was not the regular three days' *essoin* that was the grievance in Coke's time, it was the fact that a defendant might excuse himself upon the score of the king's service, absence over sea, or sickness and obtain in every case an adjournment of a year and a day. Other *essoins* there were, but the doctrine of *essoins* is now merely matter of curious learning. The old grounds, at least in part, are still available as grounds of excuse, as in the case of a soldier's exemption from civil process (*g*), and one constantly hears applications made to the Courts to postpone the trial of an action by reason of the absence or illness of one of the parties. These, however, can be clearly distinguished from *essoins*. The soldier's exemption is, within the limits put upon it by the Act, a defence to the action, not an excuse for the defendant's default, and requests made for indulgence are always matters of discretion. In respect of *essoins* the Courts had no discretion. They adjudicated upon them, for there were rules as to the admissibility of *essoins*; but when the case was brought within the rule the Court was bound to allow it, and in any case it had to adjudicate and not to exercise a discretion. Excuses of that kind that justify a default are wholly unknown in the modern practice of the law and in this particular the exception created by the statute has developed into the rule of law.

### protection

This is now perfectly obsolete; indeed, Mr. Christian, in a note to the 15th edition of Blackstone's Commentaries, says that King William, in 1692, granted a writ of protection to Lord Cutts to protect him from being outlawed by his tailor and that this is the last that appears upon our books (*h*). There is a patent of protec-

(*e*) 2 Inst. 125.

(*f*) 3 Bl. Com. 15th ed. 278.

(*g*) Army Act, 1831, s. 144.

(*h*) 3 Bl. Com. 15th ed. 289,  
note *m*. See also 3 Lev. 332.

Protection.  
See App. IV  
p. 264.

tion recited in a plea to an action of debt in Brown's Entries (*i*), published in 1675, from which it would seem that an heir and sureties of a deceased baronet might obtain protection upon the suggestion that they desired to preserve the dead man's memory and to satisfy his creditors. But it would seem, although the patent does not say so, that one of these creditors must have been the king (*k*). In this case the protected party was dismissed from the action until the expiration of the term of protection (*l*).

### wager of law

**Wager of law.** This was in earlier times the only course by which a defendant could become a witness in his own cause. The vice of it was that his evidence when so given was conclusive. Even in Blackstone's time it had become obsolete by the substitution of newer forms of action, in which the wager of law was not admissible, for the older forms, such as debt, detinue &c. (*m*).

### aid prayer

**Aid.** Sir Edward Coke says, in commenting upon this passage, that "aid prayer" in this place must be taken to include the writ "*de rege inconsulto*"—"for both are to one end" (*n*). Both these pleas have now fallen into disuse and indeed they operated as pleas in abatement and are therefore abolished by the rules made under the Judicature Acts (*o*). But although abolished in point of form the substance can still be relied upon in a proper case and it becomes necessary, therefore, to inquire what precisely the legislature intended by the exclusion of aid prayer from proceedings taken under this section. The old authorities distinguish two kinds of aid—of the king and of a common person (*p*) and the distinction, although its grounds are not easily discoverable, is very convenient for the purposes of the present discussion. Aid of a common person was sought only when, as in actions touching land, a title came in question and the party defendant relied upon the title of a third person. Thus tenant for life prayed aid of his reversioner, bailiff of his master and so forth (*p*). But a case of this sort could hardly arise under this section. Aid of the king might be prayed in all cases in which the king's interest might be concerned (*p*), and this would evidently let in most if not all cases of patents and is

(*i*) 2 Bro. Ent. 106.

(*k*) Co. Litt. 130a.

(*l*) See also App. IV. p. 264.

(*m*) 3 Bl. Com. 347.

(*n*) 3 Inst. 183.

(*o*) R. S. C., Ord. XXI. r. 20.

(*p*) Com Dig., tit. "Aide."

probably the ground of principle for the rule laid down in the case of *Alton Woods* that "be the patent good or void yet the patentee shall have aid" (q). It was doubtless to provide against the embarrassment thus caused that this proviso was introduced.

The word, however, comprehends more than this particular kind of aid prayer and, seeing that Sir Edward Coke interprets it in a large sense as including "*de rege inconsulto*," it may be material to inquire whether it has any application to the practice which in modern times has replaced the old plea. Two incidents of modern practice may be suggested as standing in this position. First, the provision by which any party may be added as defendant "whose Adding de-  
fendants. presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter" (r). Consequently, although the form of objecting by a plea in abatement to the non-joinder of a defendant who ought to be included in the action is abolished, yet the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed (s). In the second place it is possible for the same result to be brought about in some cases by third party procedure (t).

In strictness, third party procedure is only applicable to a case of contribution or indemnity between joint debtors and not to a case Third party  
procedure. in which the introduction of the third party imports new grounds of defence to the action. This, under the old system of pleading, was no ground for aid, and accordingly one joint tenant could not pray aid of another because he had the same estate as the other, and had power to plead any plea and to discharge the land equally with the other (u). The strict theory is, however, not always followed in third party procedure, but parties so added are sometimes permitted to set up a title against the plaintiff, so that the third party notice becomes in effect the same thing as an aid prayer. The order made in *Eden v. Weardale Iron and Coal Co.* (x) is a case in point. Are proceedings of this kind ousted by this clause in the case of an action grounded upon the statute? It is submitted that they are not ousted even if a liberal interpretation be given to the statute. The mischief of aid prayer was that if it prevailed the writ abated and the plaintiff must begin anew. Nothing of that kind happens under the new practice. All proceedings for effecting

(q) 1 Co. Rep. 50; and see Br. Cas. 516.  
Ab. tit. Ayde del Roy. pl. 62.

(r) R. S. C., Ord. XVI. r. 11.

(s) *Kendall v. Hamilton*, 4 App.

(t) R. S. C., Ord. XVI. r. 48.

(u) Rol. Ab. 167, tit. "Aide."

(x) 34 Ch. D. 225.



**Aid.** change of parties are now conducted under the supervision of the Court in which the action is depending, and are directed not to defeating but to furthering the ends of justice. Ample security is thus given against the abuse of these expedients for the purpose of delaying a plaintiff or defeating his just right. There is, therefore, no reason for extending this provision to new cases. It may fairly be said that the rule abolishing plea in abatement has effected all and more than all which the legislature contemplated in this place, and that what is consistent with that rule cannot be inconsistent with this proviso.

It is not easy to discover precisely when aid prayer passed into desuetude. It would seem, however, that it was regarded as obsolete in 1802, for in the Medicine Stamp Act of that year (*x*) there is introduced a proviso that in an action for penalties under that Act, "no assign, protection, privilege, wager of law, or more than one imparlance shall be allowed." The absence of any proviso against injunction indicates the rehabilitation of the Equity Courts in public confidence, and the absence of any reference to aid prayer can only indicate that it had then ceased to be a feature in the practice of the law.

### privilege

**Privilege,**

This at the date of the statute was a large and important subject in connection with litigious procedure. Not only did every Court privilege its own officers, so that there was privilege of Chancery, of King's Bench, of Common Pleas, or of Exchequer, which enabled attorneys and other officers of these several Courts to sue or insist on being sued in the particular Courts to which they were severally attached, but there was the still more formidable privilege of the Exchequer which every man might claim who was a debtor or accountant to the Crown (*y*). Over and above these were privileges, such as of Parliament and the like, which necessitated alterations in the course of procedure even when they did not answer the writ (*z*).

Now as it was one of the express provisions of this section that the plaintiff should have the choice of the forum—"the action . . . to be heard and determined in the Courts of King's Bench, Common Pleas or Exchequer, or in any of them"—it was plainly necessary to shut out the plea of privilege, which would enable a defendant to decline any forum save that in which he was privileged, and in particular it was pressingly necessary to exclude the privilege of

(*x*) 42 Geo. 3, c. 56.

(*y*) 2 Inst. 551.

(*z*) Com. Dig. tit. Privilege.



the Exchequer if that Court was not to obtain a practical monopoly of this litigation, since it may safely be assumed that in those days the number of patentees who were neither debtors nor accountants to the Crown would be but small, and the apprehension of being met with this plea if the action were brought elsewhere than in the Exchequer would lead plaintiffs to take their grievances to this Court as a mere matter of precaution. But however important once, the subject is of no practical interest now. It is indeed possible that privilege still exists. So recently as 1886 the privilege of a solicitor to be sued in the High Court was discussed and disallowed only on the special ground that the particular solicitor who set it up had voluntarily waived it by his own conduct in the circumstances then under consideration (*a*). But whatever the theory may be, the plea is certainly not now available in an action grounded on this statute. Not only is it antiquated by reason of the unification of the several Courts into one High Court, but being at best a plea in abatement only, it is expressly abolished by the existing Rules of Court (*b*).

of the  
Exchequer.

See App. IV.  
p. 257.

*Day v. Ward.*

### injunction or order of restraint

This provision has been extended to all actions in the High Court of Justice by the Judicature Act, 1873 (*c*). Injunction.

Orders of restraint at the date of the Statute of Monopolies were issued not only by the Court of Chancery, but also by the Privy Council, and even by individual Privy Councillors (*d*). Order of  
restraint.

The following are instances of such orders issued by the Privy Council, and solicited from that authority:—

A petition of the weavers (circa 1612) shows that an information in the Court of Exchequer against one Ricard, a merchant stranger, to put in execution the Act of Parliament of the 19th Henry VII. (*e*), prohibiting the importation of wrought silk by itself or with any other stuff, had been stayed by order of the Privy Council on the pretence that the proceeding was repugnant to a treaty with France (*f*).

A similar order was solicited by the Lord Mayor in favour of native pin merchants harassed by an information under a statute of 5 Eliz. c. 4, s. 11, revived without a saving in favour of subjects by 1 Jac. 1, c. 6 (*g*).

sub-s. 5.

(*a*) *Day v. Ward*, 17 Q. B. D. 704; *Blair v. Eisler*, 21 Q. B. D. 185.

(*d*) See above, p. 35.

(*e*) 19 Hen. 7, c. 21.

(*f*) Rememb. 521.

(*g*) *Ibid.*

(*b*) R. S. C., Ord. XXI. r. 20.

(*c*) 36 & 37 Vict. c. 66, s. 24,

nor any more than one imparlance

Imparlance.

After the declaration and before the defendant can be compelled to plead, many times there is an imparlance which is a longer and further day given by the Court, and usually till the first day of the next term, upon a petition made by the tenant or defendant whereby he craveth respite (*h*).

The doctrine of imparlances need not be pursued, for it has been held that they were altogether abolished by the Uniformity of Process Act, 1832 (*i*).

and if any person or persons shall, after notice given that the action depending is grounded upon this statute, cause or procure any action at the common law grounded upon this statute to be stayed or delayed before judgment, by colour or means of any order warrant power or authority, save only of the Court wherein such action as aforesaid shall be brought and depending, or after judgment had upon such action, shall cause or procure the execution of or upon any such judgment to be stayed or delayed by colour or means of any order warrant power or authority, save only by writ of error or attain, that then the said person and persons so offending shall incur and sustain the pains penalties and forfeitures ordained and provided by the statute of provision and præmunire made in the sixteenth year of the reign of King Richard the Second.

or after judgment

The preceding clause does not extend to the judges who try the cause, for before judgment days must be given by orders of Court. But the clause following upon these words is more general, and extends to the judges of the Court where the action is depending. So determined by a Joint Committee of Parliament (*j*).

writ of error or attain

Writ of error. The writ of error lay for an error in law apparent on the record (*k*) or where an exception was disallowed by the Court (*l*).

Of attain. The writ of attain lay from a false verdict by a jury whom it

(*h*) 14 Vin. Ab., tit. "Imparlance" (B), 336.

(*i*) 2 Will. 4, c. 39, s. 11; *Nurse v. Geeling*, 3 Dowl. P. C. 158; *Wigley v. Thomas*, 3 Dowl. P. C. 7.

(*j*) 3 Inst. 183.

(*k*) 2 Inst. 426.

(*l*) Statute of Westminster the Second, c. 31.

charged with perjury (*m*). The writ of attaint was abolished by the Juries Act of 1825 (*n*).

the pains, penalties, and forfeitures ordained and provided by the Statute of Provision and Præmunire made in the 16th year of the reign of King Richard the Second 16 Ric. 2, c. 5.

Mr. Christian, in a note to Blackstone's Commentaries, wrote so long ago as 1809: "The terrible penalties of a *præmunire* are denounced by a great variety of statutes, yet prosecutions upon a *præmunire* are unheard of in our Courts. There is only one instance of such a prosecution in the State Trials, in which case the penalties of a *præmunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles II." (*o*). *Præmunire*.

It is fortunate in this state of the practice that the offences against which these penalties are here denounced have in the progress of events become as obsolete as the penalties themselves.

## Section 5.

This section, which saved subsisting patents for new inventions from the operation of the Act, does not call for notice in this place, being in all material respects identical for present purposes with Section VI. It was repealed by the Statute Law Revision Act, 1863 (*p*). Section 5. See App. III. p. 238.

## Section 6.

provided also

The repeal of Section V. has reduced this opening phrase of the sixth section to nonsense. The meaning, of course, is—"provided nevertheless." Section 6.

any declaration before mentioned shall not extend

The form of this saving clause is very remarkable and seeing that it is the corner-stone of our existing patent law it would have been nowise surprising if it had received more attention than has in fact been bestowed upon it by judges and other expositors of the law. In the first place it is remarkable that the saving has reference only to the declaration, not to the enactments of the statute. No doubt the statute is in the main declaratory of the common law; that appears from the first clause following upon the preamble, and The general saving clause.

(*m*) *Blake's case*, 6 Co. Rep. 44; others, 2 Harg. St. Tr. 463; Vol. 6, p. 226 of the octavo edition; 4 Bl. Fortescue Delaud. Ang. ch. 26.  
 (*n*) 6 Geo. 4, c. 50, s. 60. Com. 118 (15th ed.).  
 (*o*) Trial of Jno. Crook and (*p*) 26 & 27 Vict. c. 125.

accordingly many of its enactments might in a sense be designated declarations. But this will not meet the case, for the third and fourth sections are certainly not declaratory of the common law, but statutory provisions superadded in furtherance and corroboration of the common law, which had been found insufficient to prevent the growth of the mischief of monopoly. In terms then this clause does not exempt patents for new inventions from the purview and penalty of those two clauses, and if the language be very narrowly scanned it will appear that the exemption does not in fact extend to anything except the king's declaration mentioned in the preamble. This is the only declaration which can aptly be spoken of as "before mentioned." The declaratory enactments of the first and second sections are not *mentioned*, they are *uttered* in the foregoing text of the statute, and cannot therefore with strict propriety be identified with "any declaration" in this phrase.

Form of the  
saving clause.

It is not possible to attribute the strangeness of this expression to mere ineptitude on the part of the draughtsman, nor indeed will anyone who has read the statute through with care be in the least disposed to attribute to him such a lapse from the admirable style of the whole context. This however is not a question of literary criticism, for we see by reference to the next section (7) of the Act how perfectly effectual the language of the legislature was when it was intended to express a saving without reserve. Moreover we know from Sir Ed. Coke that the Parliament deliberately refrained from affirming the goodness of patents saved by the fifth and sixth clauses of the Act because it was thought that the times limited to them were too long for the retention of the privilege in private hands and that the commonwealth should become a partaker with the patentees within a shorter space of time and, in particular, it was feared that apprentices who came to learn their manufactures from patentees might be compelled, even after the expiry of a seven years' apprenticeship, to continue as apprentices or servants still during the residue of the privilege and that consequently such numbers of men would not apply themselves thereunto as should be requisite for the commonwealth after the privilege ended. "And," adds Sir Edward, "this was the true cause wherefore both for the time passed and for the time to come, they were left of such force as they were before the making of this Act" (q).

The declarations pointed  
at.

It may still be thought that the phrase "any declaration" cannot very aptly be applied to an individual statement individually identified in the context; but a reference to the statement itself will set

any such doubt at rest. The declaration, as embodied in the preamble of the Act, comprises four different matters and invalidates (1) grants of monopoly, (2) grants of the benefit of penal laws, (3) grants of dispensing power and (4) grants of power to compound. The declaration as cited in the preamble is somewhat abridged from its original form as may be at once seen upon reference to the King's Book (*r*). There is, therefore, perfect propriety in referring to it as a group of declarations respecting which the expression "any declaration before mentioned" would most naturally be used in this place.

What then is the precise effect of this saving which has been so carefully phrased with the view of excluding any operation of the statute upon the common law? This point, singularly enough, is at the present time quite bare of authority but, even so, there are certain considerations which must be material whenever it comes to be considered and some of these may, with great respect, be here submitted for the consideration of those to whom it may hereafter fall to argue the point.

In the first place it will be material to consider what effect has been given to the declaration defeated by this proviso and for that purpose to examine the form of the Act. This subject has been approached in a former chapter (*s*) from a somewhat different point of view and not to go over ground already trodden, I will here assume that the Act is framed so as first to endorse the king's declaration and promulgate it anew and then to add certain enactments for rendering it more effectual in the future than in the past it had proved to be. Now, putting aside penal laws—which are somewhat less directly connected with the present subject—we are left with the proposition ALL GRANTS OF MONOPOLIES ARE CONTRARY TO LAW. This is the fundamental proposition, this the declaration *par excellence*. That of course includes patents for new manufactures and in Noy's report of *Darcy's Case* they are expressly alluded to by the words "monopoly patents" (*t*). And they, equally with the playing card monopoly, are within the mischief of the statute so defined and therefore within the provisions made for its suppression.

To avoid this conclusion the sixth section provides that the declaration shall not extend to certain classes of grants of privilege in respect of new manufactures and thus it *ipso facto* becomes a statutable definition of the word monopolies, for it puts a statutable limit upon the extent of the meaning of that word. The limitation so imposed applies of course wherever throughout the Act the word

Analysis of  
the Statute of  
Monopolies.  
See above,  
p. 21.

(*r*) See App. I. p. 161.

(*s*) See above, p. 21.

(*t*) Noy, 182. See below, App. II.

p. 219.



The sixth  
section.

monopoly is used in the sense of the declaration. In the statutable sense a patent or other grant of privilege within sect. 6 is no monopoly and against such grants sects. 3 and 4 are inoperative because these sections by their terms can only take effect upon "monopolies" or the grantees of "monopolies."

That the word "monopoly" is used in a wider than this statutable sense in sect. 2 may be readily conceded. And here it may be pointed out that there is no difficulty whatever involved in ascribing the two senses to the one word. The sixth section is not in form a defining section, it operates directly on the *declaration* and indirectly only on the *words* of the declaration. When therefore a definition of the word "monopoly" is deduced from it, that definition will apply only to the word as used in that context, or elsewhere in the same sense. Now it is very plain that in sects. 3 and 4 the sense is the same for they, like the declaration, proceed upon the premisses that the monopoly is invalid. Sect. 2, on the other hand, contemplates an inquiry into the validity of the monopoly and hence to the word "monopoly" as there used the larger meaning must necessarily be attributed.

Assuming then that no difficulty remains as to the meaning of the words, the construction of the Act may proceed as follows:—

1. It declares that all monopolies are contrary to law.
2. It asserts that certain monopolies have been procured in defiance of the law.
3. It provides with a view to the avoiding of these illegal monopolies and for the preventing of the like in time to come—
  - (a) for the republication of the law by Act and authority of Parliament. (Sect. 1.)
  - (b) for trying the validity of all claims to monopoly by common law. (Sect. 2.)
  - (c) for disabling all persons for the use or exercise of any monopoly. (Sect. 3.)
  - (d) for giving a new and effective remedy to persons aggrieved by any monopoly. (Sect. 4.)

But it provides also that certain specified patents shall not fall under the terms of the declaration. Therefore upon the principle *cessante ratione cessat ipsa lex* (*u*), the republication of the law (*a*), the

(*u*) For precedents of the application of this rule to the construction of statutes, see 2 Inst. 11.



disabling provisions (c) and the new remedy (d) must all be in-operative as against the excepted grants.

In effect therefore it would seem to have been but an unimportant difference between the form of saving clause adopted in the sixth and that in the seventh sections. This conclusion is, however, the result of experience and could not have been reached with equal certainty, perhaps not at all, by those who had no experience to go upon save their own bitter experience of the manifold inconveniences to which monopolies, conferred upon favourites of the court and suitors of the king, gave rise. That they should have drawn the distinction between the best royal grants and grants conferred by Parliament is far less surprising than that the course of subsequent events should have obscured their point.

for the term, &c.

At this point we reach the beaten track of patent law. The remaining provisions of this section have been so fully discussed in reported decisions and text books that the only service which the present commentator can now do his readers is to refer them to the elaborate works of Goodeve, Lawson, Higgins, Terrell, Edmunds, Cunynghame, Frost, Griffin, Hampson (Digest of Patent Office Reports), and many other contemporary writers—too many indeed for individual mention. General patent law.

8. Provided also, That this Act shall not extend to Section 8.  
any warrant or privy seal made or directed, or to be made or directed by his majesty, his heirs, or successors to the justices of the courts of the king's bench or common pleas, and barons of the exchequer, justices of assize, justices of oyer and terminer and gaol delivery, justices of the peace and other justices for the time being, having power to hear and determine offences done against any penal statute, to compound for the forfeitures of any penal statute depending in suit and question before them, or any of them respectively, after plea pleaded by the party defendant.

Warrants of this kind to mere busybodies are struck at by the declaration and the enactments of the first section of the Act. That such persons had become very pestilent in the time of Elizabeth and the first James may well be credited. A striking instance is the case of Sir Giles Mompesson, one of the charges against whom Common informers.

was that he had procured a warrant to compound for the penalty of obsolete laws touching the price of horse meat (*x*).

Sections 9,  
and the rest.  
Special  
savings.

The remaining sections of this Act do not call for commentary since they relate only to exceptions created in favour of monopolies that have long since ceased to have any force. They will however repay careful perusal in connection with the parliamentary debates and detailed history of the time for they are the direct outcome and therefore expression of the compromise with powerful and not seldom mischievous interests by which the bill was navigated through a troublous passage in the House of Lords and probably elsewhere in the verge of the Court.

(*x*) 1 Parl. Hist. 1201.

## CHAPTER III.

COMMENTARY ON THE 32ND SECTION OF THE PATENTS  
ACT, 1883 (a).

THIS section has been construed by the Courts with reference to the common law concerning threats of the enforcement of patent rights (b), which has been taken to be embodied in the two cases of *Wren v. Weild* (c), and *Halsey v. Brotherhood* (d), and may be extracted from those authorities in the following passages:—"As soon as it was shown in evidence that the defendant really had a patent right of his own and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action. . . . The advisers of the plaintiffs seem to have thought it was enough to maintain this action to show that the defendant could not really have maintained any action, and that if well advised he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained, whereas, as we think, the action could not lie unless the plaintiffs affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which (with or without cause) he fancied he had, but a *malâ fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation" (e), and "a patent so long

*Wren v.*  
*Weild.*  
See p. 12.

(a) 46 & 47 Vict. c. 57.

(b) See *Challender v. Royle*, 4 R. P. C. 370; *Barrett and Elers, Limited v. Day*, 7 R. P. C. 58; *Skinner v. Shew*, (1893) 1 Ch. 420;

*Skinner v. Perry*, 10 R. P. C. 5.

(c) L. R. 4 Q. B. 730.

(d) 15 Ch. D. 514; 19 Ch. D. 386.

(e) *Wren v. Weild*, L. R. 4 Q. B.

*Halsey v.  
Brotherhood.*

See pp. 14, 73.

as it subsists is *prima facie* good, and therefore a patentee who issues notices against purchasing from a vendor alleging infringement of his patent is not bound to follow up his notices by taking legal proceedings, and provided he issues the notices *bonâ fide* in assertion of what he believes, though erroneously, to be his legal rights under his patent, he does not render himself liable to an action by the vendor for damages for injury caused by issuing them, though he may be liable, notwithstanding his *bona fides*, to be restrained by injunction from continuing to issue the notices if it is proved in the action for an injunction that his allegation of infringement is untrue" (*f*).

"Therefore . . . the plaintiff must make out, if he wants to maintain an action for damages, that the defendant has not been acting *bonâ fide*. If he wants an injunction he must make out that the defendant intends to persevere in making the representations complained of, although his allegation of infringement by the plaintiff is untrue" (*g*).

*Skinner v.  
Shew (or  
Perry).*

The result of these cases was compendiously stated by Bowen, L. J., in *Skinner v. Shew* (*h*), to the following effect:—"At common law there was a cause of action whenever one person did damage to another wilfully and intentionally and without just cause or excuse. Under the head of that class of action came the action of slander of title, whether the subject of the slander was real or personal property. If a man falsely and maliciously—because the malice would show there was no just cause—made a statement about the property of another which was calculated to do and which did do damage to the other in the management of that property, an action would lie at common law and damages would be recoverable, and in Chancery, I suppose, that even if you could not prove that

(*f*) *Halsey v. Brotherhood*, 15 Ch. D. 514. Headnote quoted by Lindley, L. J., in *Skinner v. Perry*, 10 R. P. C. 5.

(*g*) *Halsey v. Brotherhood*, *ubi sup.*, p. 523.

(*h*) (1893) 1 Ch. D. 422. See also *Skinner v. Perry*, 10 R. P. C. 6.

actual damage had occurred, the Court might, if actual damage was likely to occur, prevent the wrongful act by injunction. . . . It is to be observed that in order to make good such a cause of action at common law or to make good such an application for interference by a Court of Equity you must show that the statement was false and malicious, a wilful act done without just cause or excuse. And in the case of a person putting forward in the maintenance of what he conceived to be his rights a false statement which was not in itself defamatory, believing it to be true, even if the statement did damage to another person, an action would not lie at common law and the Court of Equity would not interfere. Why? Because he would be acting upon his rights in putting forward his own case. The law would not accordingly interfere, and a threat about infringement or alleged infringement could not therefore be made the subject of an action or a suit unless the plaintiff was prepared to show that it was made *malâ fide* and that there was no reasonable excuse for it."

It will be observed that the statement concerning the law as to injunction made here by the Lord Justice differs somewhat from the dictum above quoted from Jessel, M. R., in *Halsey v. Brotherhood* (i), inasmuch as malice, which is in the last-mentioned judgment only connected with the right to recover damages, is here made a condition of the right to an injunction. But it is probable that the M. R.'s somewhat gnomie rule is not quite accurate, for in dismissing the claim to injunction in *Halsey v. Brotherhood* he himself said, "I have read the whole statement of claim through almost *verbatim*, because I want to show . . . that there is no allegation . . . that the defendant intends to continue the same course of conduct, *although he was aware that there had been no infringement* on the part of the plaintiff" (k). In the passage here printed in italic type the judge himself suggests an allegation of express

The rule in Equity.

*Halsey v. Brotherhood.*  
See above,  
p. 72.

(i) See above, pp. 14, 72.

(k) 15 Ch. D. 524.



malice as being indispensable to the statement of the plaintiff's case. This view was expressly adopted by the Court of Appeal in affirming the decisions of the M. R., Coleridge, L. C. J., observing, "It seems to be clear that if a statement is made in defence of the defendant's own property, although it injures and is untrue, it is still what the law calls a privileged statement; it is a statement that the defendant has a right to make, unless, besides its untruth and besides its injury, express malice is proved; that is to say, want of *bona fides* or presence of *mala fides*" (*k*); and Lindley, L. J., "It seems to me that no injunction will lie against him so long as he acts honestly. But if it is proved that his statement is false to his knowledge, and there is reason to suppose that he intends to repeat those false statements, an injunction ought to lie, because he would be about to do that which he has no right to do" (*l*). And the same view has been generally adopted in our Courts (*m*). But in the case of *Household and Rosher v. Fairburn and Hall* (*n*), Kay, J., considered that although an injunction ought not to be granted, the patentee might be put under terms to prosecute an infringement action. Subsequently on his failure to observe the terms and prosecute the action with due diligence, the injunction was granted (*o*).

*Household v. Fairburn.*

Object of the 32nd section.

This section in the Patent Act was introduced after and partly in consequence of the decision in *Halsey v. Brotherhood*. The object was to cure two blots; first of all, to give an action for damages where there was not one before; and secondly, to enable an action to be brought against a man who uses threats unless he will or does follow up his threat by commencing an action himself. The substance of the section is that you are not to threaten;

(*k*) 19 Ch. D. 388.

(*l*) *Ibid.* p. 393.

(*m*) See *Brauer v. Sharp*, 3 R. P. C. 197; *Eng. and Amer. Machinery Co., Limited v. Gare Machinery Co., Limited*, 11 R. P. C. 631; *Dredge*

*v. Parnell*, 13 R. P. C. 394. See also with reference to the common law as to threats, *Challender v. Royle*, 36 Ch. D. 425.

(*n*) 1 R. P. C. 114.

(*o*) 2 R. P. C. 142.

you are not to do it even in a general kind of way which might not be regarded as a threat to any particular person. You are not to do it even by a circular or advertisement, but if you do threaten no action is to lie against you if you will prosecute the person aimed at by your threats (*p*).

It must here be observed that the common law as expounded in *Wren v. Weild* and in *Halsey v. Brotherhood* threw on parties aggrieved an onus which made almost nugatory the remedy given by law in cases of asserted patent right. For it must necessarily be extremely difficult to prove that the persons complained of had made their assertions of patent right maliciously and without just cause or excuse. "What is the subject-matter in the first part of the section? It is a threat about a patent action. Now, every person of common sense knows what is involved in patent actions, and what the expense of them is, and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man of business, and is the thing most calculated to paralyse a man in his business, even if he be innocent of any infringement of patent law. . . . The Legislature desires that threats of patent actions shall not hang over a man's head—that the sword of Damocles in such a case should either not be suspended or should fall at once, and it is with that view that the section seems to be framed" (*q*). This section imposes an absolute prohibition against a person's threatening unless the threatener can bring himself within either of the two saving clauses at the end of the section. A man shall not threaten legal proceedings unless the manufacture to which the threat applies infringes the legal right of the threatener or unless the threatener is about to bring forth with an action to show the validity of his threats. If he cannot bring himself within either of those two saving clauses, then the section absolutely forbids his threatening

The mischief.  
See pp. 11, 84.

(*p*) Per Lindley, L. J., in *Skinner v. Shew*, (1893) 1 Ch. 421. (See also *Skinner v. Perry*, 10 R. P. C. 5.)

(*q*) *Ibid.* per Bowen, L. J., pp. 423—425.

*Bona fides.*  
Privilege.  
See pp. 14, 79.

legal proceedings with regard to a patent action at all and it is *nihil ad rem* to say that what he did was *bonâ fide*, or that what he did was on a privileged occasion because the section enacts that a man shall not threaten unless he comes within either of the two provisoes at the end of the section (*r*).

New remedy  
not penal.  
See below,  
pp. 85, 143.

The action given by this section is a new remedy, and has been held to be based on a new cause of action (*s*). Whether it is in the nature of a penal action has been considered and, apparently, with the result that it has been held not to be such (*t*), and indeed it would seem to be clear upon principle that this is not in any sense a penal statute (*u*). The action founded upon this section is now familiarly known as a "threats" action—a convenient term for which we are apparently indebted to Mr. Justice Kekewich, who seems to have invented the expression, or at least to have given it currency and judicial sanction, in the course of his judgment in *Combined, &c. Co. v. Automatic, &c. Co.* (*x*).

"Threats"  
action.

The section is as follows :—

### 32. Where any person

Corporation.

The action lies against a corporation. This has been expressly decided in one case (*y*) and has been acted upon in many cases (*z*).

(*r*) *Skinner v. Shew*, (1893) 1 Ch. 426, per A. L. Smith, L. J. With further reference to the mischief of threats aimed at in this section see the judgment of Day, J., in *Willoughby v. Taylor*, 11 R. P. C. 52, and of Field, J., in *Crampton v. Patents Investment Co., Limited*, 5 R. P. C. 392.

(*s*) *Challender v. Royle*, 36 Ch. D. 440; *Combined Weighing and Advertising Co. v. Automatic Machine Co.*, 42 Ch. D. 668.

(*t*) *Driffield, &c. Co. v. Waterloo, &c. Co.*, 31 Ch. D. 642. The judgment here, which is perhaps ambiguous, should be read in con-

nection with the argument of Aston, Q.C., on p. 641, which it appears to indorse.

(*u*) See above, p. 52.

(*x*) 42 Ch. D. 671.

(*y*) *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, 42 Ch. D. 669.

(*z*) See *Fusee Vesta Co. v. Bryant & May*, 4 R. P. C. 194; *Kensington, &c. Co. v. Lane-Fox Elec. Co., Limited*, (1891) 2 Ch. 579. Others might be cited; the foregoing have been selected because in these cases judgment went against the corporations.

The threat may be uttered by an agent (a). But the issuing of Agent.  
the threat must be within the scope of the agent's authority (b). A  
solicitor is an authorized agent for this purpose (c), but in the case Solicitor.  
of threats by commercial travellers the authority must be expressly Commercial  
proved (d). traveller.

### claiming to be the patentee of an invention

The claim may be unfounded in fact.

The 46th section of the Act provides that "In and for the pur- Not a patentee  
poses of this Act. . . . 'Patentee' means the person for the time in fact.  
being entitled to the benefit of a patent," and that "'Invention'  
means any manner of new manufacture the subject of letters patent  
and grant of privilege within section six of the Statute of Monopo-  
lies. . . . and includes an alleged invention." These words "any  
person claiming to be the patentee of an invention" therefore  
mean any person claiming to be entitled to the benefit of the patent  
and include the case of the assignee of a patent and of any person  
in a similar position having an interest in the patent within the  
46th section (e). Thus the words "by whom all Mr. Lane-Fox's  
patents for his system of electric light distribution are now held"  
in a circular issued by the Lane-Fox Electrical Company brought  
that company within these words of the section although the com-  
pany was not in fact the registered owner of the patents (f) nor  
within the definition of a patentee as given in the patent itself (g),  
and in *Barnett and another v. Barrett* it appears to have been taken  
for granted that the action would lie against a licensee (h). In that  
case however the report does not show that the question of the  
action's abating against the parties defendant was at all discussed,  
and perhaps the correct view of that case is that as they had written  
in the circular complained of "a direct infringement of *our* patent"  
they were persons *claiming to be patentees*, and therefore within the  
32nd section under the rule subsequently enunciated in *Kensington*  
*v. Lane-Fox* (f) and mentioned above.

(a) *Ungar v. Sugg*, 9 R. P. C.  
120; *Combined Weighing, &c. Co. v.*  
*Automatic Weighing, &c. Co.*, 42  
Ch. D. 669; *Driffield, &c. Co. v.*  
*Waterloo, &c. Co.*, 31 Ch. D. 638;  
*Dowson, Taylor & Co. v. The*  
*Drosophore Co., Limited*, 11 R. P. C.  
536.

(b) *Ungar v. Sugg*, 9 R. P. C.  
120.

(c) *Barrett v. Day*, 43 Ch. D.  
439.

(d) *Ungar v. Sugg*, 9 R. P. C.  
118.

(e) *Kurtz v. Spence*, 3 R. P. C.  
371.

(f) *Kensington, &c. v. Lane-Fox*,  
&c., 8 R. P. C. 280.

(g) See p. 108.

(h) 1 R. P. C. 9.

Rubbishy patent.

The section applies although the patent in respect of which the threat is issued be a rubbishy one (*j*).

Agent not personally liable,

But the agent of the person claiming to be the patentee, although he (the agent) personally utters the threats complained of, is not primarily liable under the section. But he may be restrained by the injunction (*k*).

### by circulars, advertisements or otherwise threatens

by circulars, "or otherwise."

The explanation of the insertion of these words "circulars or advertisements" is that they are to enlarge the words "or otherwise" rather than to cut them down. It might well be doubted whether a threat which was not addressed to a particular person, or to a particular customer, could be said to be a threat if it was couched in the general form of an advertisement issued to the world, or a circular issued to the trade. It might be said that it was not a threat at all. "I am only informing the world"—the defendant might have argued—"as to the way in which I intend to do my business." The statute says circulars and advertisements nevertheless may contain threats, and uses those words "or otherwise" so as to sweep into its net every kind of threat the result of which might be to paralyze a man in his trade by holding an action on a patent suspended before his eyes without affording him the opportunity of determining the suspense at once, and bringing the question raised by his antagonist to a speedy and immediate issue (*l*).

Oral threats. See below, p. 82.

Oral threats were held by Bristowe, V.-C., to be threats within the section in *Challender v. Royle* (*m*). And it seems to have been assumed in the case of *Ungar v. Sugg* (*n*), both in the Court below and in the Court of Appeal, that words used by commercial travellers in the ordinary course of their business might, if authorized by the person claiming to be the patentee, be threats within the meaning of the Act.

Equivocal threats.

Threats which upon their grammatical construction are ambiguous may be restrained if so framed as to lead people to believe that they are complaints of what the plaintiff is doing as being an infringement of the defendant's rights (*o*).

General warning.

A threat may be restrained even if it be expressed in very general terms, although it is no threat within the section merely

(*j*) *Johnson v. Edge*, (1892) 2 Ch. 9.  
 (*k*) *Overton v. Burn*, 13 R. P. C. 455.  
 (*l*) *Skinner v. Shew*, (1893) 1 Ch. 425, 426; *Crampton v. Pat. Invest. Co., Limited*, 5 R. P. C. 393.  
 (*m*) 4 R. P. C. 366.  
 (*n*) 9 R. P. C. 118, 120.  
 (*o*) *Burt v. Morgan & Co.*, 4 R. P. C. 281.



to say that which the patent itself implies, namely, that anybody infringing must expect legal proceedings to be taken against him. It is merely saying what everybody knows already. That is not a threat against anybody in particular. But the question to be considered is—in the case of a circular addressed to the trade for example—“What can that mean to people in the trade?” “What would they understand by it?” If the warning amounts to an intimation that certain things are infringements, and would be so understood by people in the trade, that takes the given warning out of the class of cases alluded to in *Challender v. Royle* (p), and there designated “general warnings” by Bowen, L. J. (q).

Understand-  
ing of the  
trade.

Everybody has still a right to issue a general warning to pirates not to pirate, and to infringers not to infringe, and to warn the public that the patent to which the patentee is entitled, and under which he claims, is one which he intends to enforce. But it does not follow that because a threat is so worded as grammatically to apply only to the future, therefore it may not in any particular case be in substance and in fact applicable to an actual case of infringement (r). Suppose that a manufacturer is making and issuing machines which the patentee considers to be an infringement of his patent, and the patentee issued a threat really directed against the manufacture and sale of those machines, he could not escape from the section by wording his notice in such terms that according to the letter it was only a general warning to persons not to infringe his patent (s).

General  
warning  
(*Challender v.  
Royle*).

A threat within this section cannot be justified upon the ground that it was uttered on a privileged occasion. There is nothing in the language of the thirty-second section which invites or allows the consideration of such a question as privilege (t).

Privilege.  
See above,  
p. 76.

An intimation does not cease to be a threat because it is addressed to a third person in answer to an inquiry or because it is addressed to the supposed infringer himself. We are not dealing here with libel or questions of publication we are dealing with threats. If I threaten a man that I will bring an action against him I threaten him none the less because I address the intimation to himself, and

Addressed to  
third person.  
See below,  
p. 84.

(p) 36 Ch. D. 441.

(q) *Johnson v. Edge*, (1892) 2 Ch. 9, 11; *Ungar v. Sugg*, 8 R. P. C. 388.

(r) The words “applicable to what has been done,” used by Bowen, L. J., in this connection, were very much discussed in *Johnson v. Edge*, (1892) 2 Ch. 10, 12. It is hoped that the Lord Justice’s

meaning as ascertained by the Court of Appeal in the later case has been correctly represented in the text.

(s) *Challender v. Royle*, 36 Ch. D. 441; *Willoughby v. Taylor*, 11 R. P. C. 53.

(t) *Skinner v. Shew*, (1893) 1 Ch. 422.

I threaten him none the less because I address the intimation to a third person (*u*).

Injunction goes against continuance. Evidence of intention to continue, and *contrá*.

The injunction goes against the *continuance* of the threats complained of, and therefore evidence of an intention to continue the threats is necessary (*x*). A threat uttered and not withdrawn is continued and from such continuance an intention to continue threatening can be inferred (*y*). In the closely analogous case of an advertisement issued by the plaintiff in a patent action during the pendency of the action announcing that the action had been brought in consequence of "continued infringement" and threatening the commencement of actions against all persons, &c., an undertaking not to issue, pending the action, any advertisement stating that the defendants had infringed was accepted and the injunction refused (*z*). But it is to be noted that in this case the motion was not made under the section but upon the ground that the advertisement complained of tended to prejudice the trial of the action. The offence therefore was contempt, not a threat.

The following are examples of intimations which have been held to be threats within the section.

Threats.  
Instances.  
See above,  
p. 75.

"Noticing that you are exhibiting at the above show a 'Ralli' car mounted on Cee springs, a direct infringement of our patent, we have to request that you will immediately remove same from the show, dismount same, and render us some explanation as to your infringement of our patent rights. Your compliance with our just and reasonable request to avoid any unpleasantness will greatly facilitate matters" (*a*).

Circular to  
the trade.

"It having come to our knowledge that certain of our patents are being infringed. . . . we hereby caution our numerous friends against purchasing these imitation goods. It cannot be too generally known that all parties who handle a patented article from the maker to the user, including also importers, are liable to the patentee. Our patent solicitor has instructions to take proceedings against all infringers" (*b*). This threat was issued in the form of a circular and appears to have been considered by Kekewich, J., not

(*u*) *Skinner v. Shew*, (1893) 1 Ch. 423, 424; *Burt v. Morgan*, 4 R. P. C. 280.

(*x*) *Eng. and Amer. Machinery Co. v. Gare Machinery Co.*, 11 R. P. C. 632; *Fusee Vesta Co. v. Bryant & May*, 4 R. P. C. 193; *Brauer v. Sharp*, 3 R. P. C. 197. In *Burt v. Morgan*, 4 R. P. C. 281, an undertaking was accepted in place of an

interim injunction.

(*y*) *Drifffield, &c. Co. v. Waterloo, &c. Co.*, 31 Ch. D. 643; *Barrett v. Day*, 43 Ch. D. 449.

(*z*) *Gaulard and Gibbs v. Lindsay*, 4 R. P. C. 190.

(*a*) *Burt v. Morgan & Co.*, 4 R. P. C. 280.

(*b*) *Challender v. Royle*, 36 Ch. D. 426.

to have been a threat within the section. See his comments upon this case in *Kurtz v. Spence* (c). Threats—instances of.

“Mr. R. . . . has handed me your letter of the 15th of April, and in referring to it I beg to state that I am instructed by Mr. R. . . . to take proceedings against all infringers” (d).

This was in a letter addressed by the defendant’s solicitor to the plaintiff’s solicitor, and is commented on by Kekewich, J., in *Kurtz v. Spence* (c). Letter to plaintiff’s solicitor.

“Caution.—Beware of spurious imitations. None are genuine but those sold under Bell’s Patent and Trade Mark. Infringers and those dealing in these spurious imitations are liable to legal proceedings.” Advertise-ment.

In this case the judge appeared to attach some importance to the use of the present tense “are liable.” The advertisement in which this threat appeared was issued during the pendency of proceedings to amend the specification (e).

“Caution.—Walsh’s glow-worm lamps are an infringement of my patent, and agents are now going through the country to get all the evidence they can to take legal proceedings against the vendors, that being the course decided upon by my solicitors” (f). Letter to plaintiff’s customer.

“It was only Saturday last that my client was enabled to procure a copy of Messrs. Barnett (meaning Barrett) and Varley’s specification. It is clearly an infringement upon his patent. I thought it right to have this matter investigated before proceeding. I have now only to notify to you that in the action against your clients claims will be made in respect of this patent. I think it is only right to inform you of this before the writ is issued” (g). Defendant’s solicitor to plaintiff’s customer’s solicitor.

This example is cited because the threat is made in respect of what is palpably no infringement—i. e. a description in a subsequent specification—and does not allege any “manufacture, use, sale or purchase to which” the threats relate. It was therefore not within the category of threats enumerated in the section (h). The point, however, does not seem to have been taken in argument and was probably not present to the mind of the judge when deciding the question.

“We have been advised that you as one of the users of the said system of distribution are liable for the infringement. We beg therefore to caution you of the fact and to offer you an indemnity Defendant to plaintiff’s customer.

(c) 5 R. P. C. 171.

(f) *Walker v. Clarke*, 4 R. P. C.

(d) *Challender v. Royle*, 36 Ch. 113.

D. 427.

(g) *Barrett v. Day*, 43 Ch. D.

(e) *Fusee Vesta Co. v. Bryant & May*, 4 R. P. C. 193.

(h) See below, p. 84.

upon the terms contained in the enclosed circular. Those terms, however, are to be considered as withdrawn if not accepted by the 28th inst." (*k*).

Circular  
issued with  
goods.

"Notice to grocers and others. Information of extensive violation of Mr. W. E.'s patent rights has been received. All parties are warned not to infringe these rights" (*l*).

Answer to  
inquiry.

"We beg to confirm our opinion previously expressed that the camera in question is an infringement of our patent No. . . . We have taken further advice in the matter and are prepared to stop the sale of this camera if placed upon the market. If you are willing to do so, it would save time and trouble if you would give us the name of the manufacturer, and we will communicate direct with him" (*m*).

Letter to  
plaintiff's  
customer.

"I am in receipt of your letter of yesterday's date, and am very sorry to hear what has happened. I think at any rate you might have asked me a price for my gas-buoy lanterns. I am very much afraid that this matter will lead to a great deal of difficulty and some unpleasantness and ill-feeling, and you must not be surprised if this company applies for an injunction against Mr. D. . . . to restrain him from selling his gas-buoy lanterns" (*n*). This threat was contained in a letter to the purchasers of the lanterns in question.

Admitted  
threats.

There are numerous reported cases in which the threat of legal proceedings has been so express and pointed that the question threat or no threat did not admit of argument (*o*).

Oral threats.  
See above,  
p. 78.

The foregoing threats are all contained in written communications. In *Challender v. Royle* complaint was made of oral threats, in addition to a threat expressed in writing. The facts deposed to were that a gentleman, known to be a traveller or agent representing the defendant, came into the deponent's place of business and asked for one of C——'s patent tap unions. He was supplied with one and thereupon left the shop, but returned in a few minutes and

(*k*) *Kensington, &c. Co. v. Lane-Fox Elec. Co.*, (1891) 2 Ch. 574.

(*l*) *Johnson v. Edge*, (1892) 2 Ch. 2.

(*m*) *Skinner v. Shew*, (1893) 1 Ch. 414.

(*n*) *Douglass v. Pintsch*, 13 R. P. C. 675, 680.

(*o*) The following may be enumerated:—*Barnett and Foster v. Barrett's, &c. Co., Limited*, 1 R. P. C. 9; *Driffield, &c. Co. v. Waterloo, &c. Co.*, 31 Ch. D. 638; *Herr-*

*burger v. Squire*, 5 R. P. C. 584; *Combined Weighing, &c. Co. v. Automatic, &c. Co.*, 42 Ch. D. 666; *Colley v. Hart*, 7 R. P. C. 106; *Mackie v. Solvo Laundry Co.*, 9 R. P. C. 466; *Edlin v. Pneumatic Tyre Co.*, 10 R. P. C. 312; *Eng. and Amer. Machinery Co. v. Gare Machinery Co.*, 11 R. P. C. 628; *Dowson, Taylor & Co. v. Drosophore, &c. Co.*, 12 R. P. C. 96; *Overton & Co. v. Burn and others*, 13 R. P. C. 455.



stated that the tap union sold to him was an infringement of a tap union of which Mr. R—— was the inventor, and which was duly protected by letters patent, and that Mr. R—— contemplated legal proceedings in respect of the infringement, and cautioned the deponent's firm not to sell any more of C——'s patent tap unions. A second instance of a threat made in conversation was also given in evidence, and Bristow, V.-C., held that these threats were covered by the words "or otherwise" in the section (*p*).

An intimation not a threat. It does not appear from the reports that the defence of no threat has ever yet been made good in any contested case. But the following dicta indicate what in the view of the Courts are intimations that do not amount to threats:—

What is not a threat.

By Bowen, L. J., in *Challender v. Royle* (*q*): "Everybody, it seems to me, has still the right to issue a general warning to pirates not to pirate and to infringers not to infringe, and to warn the public that the patent to which the patentee is entitled and under which he claims, is one which he intends to enforce."

Opinion of Bowen, L. J.

By Wright, J., in *Ungar v. Sugg* (*r*): "The section of the Act is limited to threats, and I do not think that it subjects a patentee to an action for publishing a general statement that he claims to be the owner of a valid patent which covers all articles of a particular description; nor do I think that it makes him liable for a statement such as that he has an action pending against a third party for infringement, unless that statement is in fact meant or calculated to operate as a threat."

Opinion of Wright, J.

By Lindley, L. J., in *Johnson v. Edge* (*s*): "I cannot suppose that the section prevents a patentee from saying that which the patent itself implies, namely, that anybody infringing must expect legal proceedings to be taken against him. . . . It is merely saying what everybody knows already. That is not a threat against anybody in particular." The Lord Justice then proceeded to consider the case of a threat issued with reference to an intended infringement but before any infringement actually committed with reference to the dictum of Bowen, L. J., in *Challender v. Royle* (*t*), and was of opinion that such a threat issued in advance of the infringement in question would nevertheless be within the section. But he qualified the expression of opinion with a doubt.

Of Lindley, L. J.

By Kay, L. J., in the same case. . . . "If a man stated 'I have got a patent and I mean to protect that patent by enforcing all my legal rights under it,' a general warning of that kind, not pointed

Of Kay, L. J.

(*p*) 4 R. P. C. 366.  
(*q*) 36 Ch. D. 441.  
(*r*) 8 R. P. C. 388.

(*s*) (1892) 2 Ch. 9.  
(*t*) 36 Ch. D. 441.



against any particular person, and which would not be by the public understood to apply to any particular person, might not be within the 32nd section at all" (*u*).

Of Day, J.

By Day, J., in *Willoughby v. Taylor* (*x*), "The section, generally, must be taken as intended to apply not to all cases of threats but to cases of threats where there is some colour or foundation for the threat. I do not know that I can put it much better than that. I have not time to consider expressions at present, but that conveys generally what I mean that there must be some colour or foundation for the suggestion of an actual infringement or some colour or foundation of a right to maintain an action—and such would be the more correct way of putting it—there must be some pretence for suggesting that an action might be brought."

### any other person

Threats addressed to a third person.

See pp. 79, 85.

The person threatened is not necessarily the person to whom the intimation is addressed. An intimation does not cease to be a threat because it is addressed to a third party (*y*). And it seems to be the better opinion that the party threatened need not be charged with actual infringement (*z*).

### with any legal proceedings or liability

Nature of threat. See above, p. 75.

The reference in the threat complained of to legal proceedings or liability may be quite vague. "All parties are warned not to infringe these rights" was held sufficient in *Johnson v. Edge* (*a*).

### in respect of any alleged use, sale, or purchase of the invention

Limit of section.

It would seem that these words limit the scope of the section, and that threats not founded upon an "alleged use, sale, or purchase," or perhaps upon an "alleged intended use, sale, or purchase," are not contemplated (*b*).

### any person or persons aggrieved thereby

Aggrieved person. See above, p. 41.

A person is aggrieved who shows that the threats complained of

(*u*) (1892) 2 Ch. 12.

(*x*) 11 R. P. C. 53.

(*y*) *Walker v. Clarke*, 4 R. P. C. 114; *Skinner v. Shew*, (1893) 1 Ch. 423.

(*z*) *Johnson v. Edge*, (1892) 2 Ch. 9, 12.

(*a*) (1892) 2 Ch. 2.

(*b*) *Challender v. Royle*, 36 Ch. D. 440, 441; *Johnson v. Edge*, (1892) 2 Ch. 12; *Willoughby v. Taylor*, 11 R. P. C. 53. But see *Barrett v. Day*, 43 Ch. D. 445; and above, p. 75.

interfere with his business operations, and prevent them from being so effectively conducted as they otherwise would be (c).

The patentee of a rival machine would necessarily be a person aggrieved within the meaning of the section (d). Rival patentee.

With reference to the nature of the grievance contemplated by the statute, see above, p. 75.

A corporation can be an aggrieved person within this section (e). Corporation.

The "person aggrieved" is not necessarily the person to whom the threat is addressed (f), nor, apparently, the person whom the threatening party intends to attack (g). Third party.  
See above,  
p. 84.

But if a threatened action for infringement is commenced and prosecuted with due diligence after such threat, there is no ground upon which an action under sect. 32 in respect of such threat can subsequently be commenced at all. To put it in another way, if a threat to bring an action for infringement is followed up by the *bonâ fide* commencement and prosecution with due diligence of the threatened action, there is no "person aggrieved" by the threat, and therefore no person who can bring an action under sect. 32 (h). When no aggrieved person.  
See below,  
p. 94.

### may bring an action against him

This has been held to be a new cause of action. The object of the enactment was to give an action for damages where there was not one before. Such is the dictum of Lindley, L. J., in *Skinner v. Shew* (i). And the same thing has been said in many other cases. But it must be borne in mind that in none of these cases had the fourth section of the Statute of Monopolies been brought to the notice of the Court. New cause of action.  
See above,  
p. 76.

### and may obtain an injunction against the continuance of such threats

\* *Interlocutory Injunction*.—An interlocutory injunction may be obtained, but it must be upon notice; it is not a case for *ex parte* application (k). But in a case in which solicitors, the agents of foreign patentees, had issued threats and had been made co-defendants and served with notice of motion, the Court allowed the Interlocutory injunction.  
Proceeding *ex parte*.

(c) *Kensington, &c. Co. v. Lane-Fox, &c. Co.*, (1891) 2 Ch. 577; *Challender v. Royle*, 36 Ch. D. 434, 442.

114.

(g) *Skinner v. Perry*, 11 R. P. C. 411.

(h) *Barrett v. Day*, 43 Ch. D. 447.

(i) (1893) 1 Ch. 420.

(k) *Wilson v. Walter E. Church Eng. Co., Limited*, 2 R. P. C. 175.

(d) Per Cotton, L. J., in *Challender v. Royle*, 36 Ch. D. 439.

(e) *Driffield, &c. Co. v. Waterloo Co.*, 31 Ch. D. 642.

(f) *Walker v. Clarke*, 4 R. P. C.

**Interlocutory injunction.** aggrieved party to move *ex parte* against the foreign principals, and to have an interlocutory injunction against them and their agents, the order being made in particular against the co-defendants as agents of the principal defendants. But in that case the applicant was put under terms to accept short notice of motion by either defendant to dissolve the injunction (*l*).

**Evidence.** The applicant upon motion for an interlocutory injunction must make out a case of non-infringement (*m*), or alternatively a *primâ facie* case of invalidity of the patent so as to make it appear probable that at the hearing of the action he will get a decree in his favour. The Court ought not on an interlocutory injunction to attempt finally to decide the question whether the act complained of is an infringement, or (if the question of validity is raised) whether the patent is a valid one or not; yet it ought to be satisfied that on one or both of those two points the plaintiff in the action has made out a *primâ facie* case. An injunction ought to be granted only on a case made out entitling the plaintiff to that particular remedy, and not upon a mere consideration of the balance of convenience or because it cannot do the defendant any harm (*n*).

**Scope of the inquiry.** The principle laid down in *Walker v. Clarke* (*o*), if it imports that the Court has only to look at the balance of convenience, and need not be satisfied that a *primâ facie* case for relief upon the merits has been made out by the applicant, must be considered to have been definitely disapproved by the Court of Appeal in *Challender v. Royle* (*ubi supra*) (*p*).

**Balance of convenience.** The Court exercises a discretion in granting or withholding the interlocutory injunction (*q*).

**Discretion, how exercised.**

In *Barnett & Foster v. Barrett's, &c., Co., Limited* (*r*), the earliest reported case under the statute, it was ordered that the motion should stand over till after the trial of the infringement action, liberty being given to apply.

In *Kurtz v. Spence* (*s*) no order was made on the motion except that the costs of the motion be costs in the action, and that the action be set down at once for trial, directions being at the same time given for expediting the proceedings. In *Mackie v. The Solvo Laundry Co., Limited* (*t*) the defendants' undertaking to prosecute

(*l*) *Overton & Co. v. Burn and others*, 13 R. P. C. 456.

(*m*) *Barney v. United Telephone Co., Limited*, 28 Ch. D. 397.

(*n*) *Challender v. Royle*, 36 Ch. D. 436.

(*o*) 4 R. P. C. 114.

(*p*) See also *Société Anon., &c. v. Tilghman's, &c. Co.*, 25 Ch. D. 11.

(*q*) *Edlin v. Pneumatic Tyre Co.*, 10 R. P. C. 316.

(*r*) 1 R. P. C. 10.

(*s*) 5 R. P. C. 165.

(*t*) 9 R. P. C. 467.

the infringement action diligently was accepted and no order for an interim injunction made. It does not at all appear from the report what was the state of the evidence in this case but from the summary of the argument it would seem that the question of diligent prosecution was the point chiefly discussed at the hearing of the application. In *Douglass v. Pintsch* (u) the motion was ordered to stand to the trial, the threats complained of being expressed in ambiguous terms and it being made to appear to the Court upon the defendant's evidence that upon one construction of the letters which the defendants set up as their case they did not convey a threat and that the defendants did not intend to continue to threaten. The interlocutory injunction was granted in *Colley v. Hart* (x) upon evidence of non-infringement; *i. e.* upon the weight of evidence which in that case was conflicting; and upon the consideration *inter alia* that the defendant had refrained from asserting his rights by an action for infringement. The evidence is summarized in detail in the report.

Interlocutory injunction granted on weight of evidence.

The form of the interlocutory order was carefully considered in *Colley v. Hart* (x) and settled apparently as follows:—

That the defendant be restrained personally or by his servants, agents and workmen from issuing the circular dated the . . . and from, by means of circulars, letters or otherwise, threatening any person with legal proceedings or liability in respect of the following (*here follows an identifying reference to the plaintiff's papers the subject-matter of the dispute*) manufactured by the plaintiff till trial or further order.

Form of interlocutory injunction. See below, p. 89.

The order in this case was framed upon the report of *Challender v. Royle* (y). The form in that case is collected from the judgment, in which it is directed that the injunction shall go in terms of the notice of motion (z). The notice of motion is not set out in the report, but it is taken to have been identical in terms with the writ of which the material part of the indorsement is set out on p. 427 of the report. It would indeed appear from a remark made by the Vice-Chancellor and reported in the Patent Office Reports (a) that there was something more in the notice of motion which presumably was therefore not precisely in terms of the writ. In any case the form in *Colley v. Hart* was settled in view of the report of *Challender v. Royle*, and with conspicuous care by the judge who heard the application.

(u) 13 R. P. C. 62.

(x) 6 R. P. C. 21.

(y) 36 Ch. D. 427; 4 R. P. C. 368.

(z) 36 Ch. D. 430.

(a) Vol. 4, p. 368.

A very carefully elaborated notice of motion for an interim injunction is set out in the report of *Barnett v. Barrett, &c. Co., Limited* (c).

Interim injunction granted for a definite period.

When an interim injunction is granted for a definite period of time as "until trial," its terms should be settled with great precision and, apparently, upon the same principles as those upon which a perpetual injunction is settled (d).

See Form of Perpetual Injunction, below, p. 89.

The evidence to support the application must show a *primâ facie* case either of non-infringement or of invalidity (e).

Evidence in support of application for interim injunction.

The evidence given in *Colley v. Hart*—a successful application upon conflicting evidence—is summarized in the report (f), and extracts from the evidence relating to the threats complained of in *Challender v. Royle* are given in the official report of that case (g).

Application in a patent action.

The application can be made by the defendant in a patent action by way of motion in the action, and this notwithstanding that proceedings in the action are stayed (h).

See below, p. 89, as to perpetual injunction.

The application is not proper to be dealt with as vacation business (*sed quære*). The matter is so stated in *Colley v. Hart* (i), but it is to be observed that this statement occurs in a report of the trial of that case, at which the dictum of the vacation judge could only be obtained *ex relatione* and it is curious, if that were his view, that he should have required reciprocal undertakings from the parties *not to continue the threats* until the hearing of the motion thus in effect granting the injunction until that date. The doubt so suggested receives confirmation if reference be made to the earlier report of the hearing of the motion for the interlocutory injunction (k) for, although the report of that proceeding is very full and a detailed reference is made to the order of the vacation judge, there is no allusion in that place to his having ruled the application not to be proper vacation business.

Vacation business (f).

Laches.

Delay in bringing the action may disentitle the plaintiff to an interim injunction (l).

Perpetual injunction.

*The perpetual injunction.*—The section contemplates a final

(c) 1 R. P. C. 10. See also *Fusee Vesta Co. v. Bryant & May*, 4 R. P. C. 192, and *Kensington, &c. Co. v. Lane-Fox Co.*, (1891) 2 Ch. 579.

(d) *Colley v. Hart*, 6 R. P. C. 22.

(e) *Société Anon., &c. v. Tilghman's, &c. Co., Limited*, 25 Ch. D. 11; *Challender v. Royle*, 36 Ch. D. 436.

(f) 6 R. P. C. 19.

(g) 4 R. P. C. 366.

(h) *Fusee Vesta Co. v. Bryant & May, Limited*, 4 R. P. C. 193.

(i) 7 R. P. C. 103.

(k) 6 R. P. C. 18.

(l) *Edlin & Co. v. Pneumatic Tyre, &c. Co.*, 10 R. P. C. 316; *Isaacson v. Thompson*, 41 L. J. Ch. 101.



judgment(*m*). The perpetual injunction will be granted or withheld on very much the same principles, speaking generally, as the interim injunction, since even on the application for an interim injunction the party moving must show a case for this form of relief(*n*), but the granting of the perpetual injunction is not a matter of discretion but a matter of course if the legal right be proved to exist. Hence delay, that is to say, mere lapse of time apart from acquiescence or other equitable ground of defence, is no bar to the granting of the perpetual injunction(*o*).

See above, p. 85 (interim injunction).

Not discretionary.

Delay.

The form of the perpetual injunction should follow as far as possible the language of the section. In *Douglass v. Pintsch* the order settled after consideration restrained the defendant "from threatening the plaintiff by circulars, advertisements, or otherwise with any legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the gas-buoy lanterns referred to in the statement of claim," the judge refusing to add the words "or his customers"(*p*). These words appeared in the form of the injunction asked for in the action, and were omitted out of regard for the words of the section. It may however be submitted, with great respect, that as the section gives the plaintiff an injunction to restrain "such threats" as he is grieved by, it gives an injunction to restrain threats addressed to customers in a case where such threats constitute the grievance. Reference may in this connection be made to the reported form of the interlocutory injunction(*q*).

Form of perpetual injunction.

A perpetual injunction should be settled with great precision as to its terms, and demands more exactitude in this respect than an injunction made only until further order. This remark applies even to an interim injunction granted for a definite period, as until trial(*r*).

To be settled with great precision. See above, p. 88.

It would seem that a perpetual injunction, unlike an interlocutory injunction(*s*), cannot be asked for in a patent action by the defendant, for the action, if diligently prosecuted, would itself bar the defendant's right to the injunction; and hence it has been held that an action under this section commenced after the commencement of the threatened patent action is ill-conceived and may be dismissed as vexatious(*t*). The same considerations would of course

Application by way of counter-claim.

See above, p. 88, as to interim injunction.

(*m*) *Challender v. Royle*, 36 Ch. D. 434.

(*n*) *Ibid.* p. 436; and see above, p. 86.

(*o*) *Fullwood v. Fullwood*, 9 Ch. D. 179.

(*p*) 13 R. P. C. 681.

(*q*) See above, p. 87.

(*r*) *Colley v. Hart*, 6 R. P. C. 22.

(*s*) See above, p. 88.

(*t*) *Barrett v. Day*, 43 Ch. D. 450; *Dredge v. Parnell*, 13 R. P. C. 394.

apply to proceedings under this section by way of counterclaim in a patent action which was being diligently prosecuted. If on the other hand it be not diligently prosecuted and the defendant should seek to take advantage of that fact to avoid the saving clause in the section he will lay himself open to the answer that he is able, if so minded, to press the plaintiff on (*u*). It is difficult therefore to imagine circumstances in which the defendant in a patent action could effectually put forward a demand for a perpetual injunction under this section.

But it has been said that the Court has jurisdiction to deal with such an application if raised by way of counterclaim in a patent action, and in the *Fusee Vesta Co. v. Bryant and May, Ltd.* (*x*), Webster, A.-G., offered at the hearing of a motion for an interim injunction, made pending a stay of proceedings, an undertaking to put in a counterclaim to that effect so soon as the stay was withdrawn, which offer was accepted by the Court. It does not appear what became of this proposal in the end.

The injunction may be enforced by attachment but the breach to ground attachment must be very strictly proved (*y*).

and may recover such damage (if any) as may have been sustained thereby

Damages,  
how to be  
assessed.

The proper way to assess damages in these cases is to estimate them upon a fair view—not an exact view—of the facts. It is often not within the bounds of possibility that the exact amount should be ascertained by evidence (*z*). But where a case of substantial damage is shown, the difficulty and impossibility of stating the precise ground for assessing the damages at any particular figure is no sufficient reason for giving only a nominal sum. Any other sum than a mere nominal sum must only be a guess, and that kind of guess which it is the daily business of juries to make (*a*). It is better for the judge at the trial to form an estimate of such problematical damages than to send them to a chief clerk to try (*b*).

Remoteness.

The damages given must not be too remote. The defendant is liable for his own acts, for the damage caused by his own threat which he has caused to be made known to the persons to whom his circulars, &c., are given; but he is not liable for damage which is

(*u*) *Combined Weighing, &c. Co. v.* 197.

*Automatic Weighing, &c. Co.*, 42 Ch. D. 672.

(*x*) 4 R. P. C. 193.

(*y*) *Dick v. Haslam*, 8 R. P. C.

(*z*) *Ungar v. Sugg*, 9 R. P. C. 118, 119.

(*a*) *Ibid.* 8 R. P. C. 388.

(*b*) *Ibid.* 9 R. P. C. 117.

the result of a mere rumour which is not his act(c). But the amount must be estimated with a view to consequential loss, such as the effect upon the plaintiff's general business of a reduction in its leading line, as well as to the direct loss. And damages are aggravated by the repetition of threats(d). Where the question is what damage the plaintiff has sustained by reason of his failure to obtain a contract which but for the threats he would have secured, the profit which he would have gained if the contract had been carried through is the measure of his damages(e).

Aggravated  
by repetition  
of threats.

Measured by  
lost profits.

In *Willoughby v. Taylor* (f) the amount of the damage was not proved, but ten guineas was awarded upon the judge's view of the case. In *Kurtz v. Spence* (g) no special damage was proved, and the circumstances were such as to preclude the notion that serious damage was sustained. Forty shillings was awarded as general damages.

Award where  
no damage  
proved,  
10*l.* 10*s.*  
Forty  
shillings.

On the other hand in *Driffield, &c. Co. v. Waterloo, &c. Co.* (h), where no special damage was proved, the Court refused to award any sum for damages, and ruled that the fact that the defendants had been put to trouble in looking over their machinery and obtaining the advice of expert persons as to their patent and its terms, was no such ground of damage(i). And in *Skinner v. Perry* (k) an inquiry as to damages was ordered, but stayed until the beginning of the ensuing term, for the purpose apparently of giving the defendant an opportunity of commencing an action upon his patent when amended.

Nothing.  
  
  
  
  
  
  
  
  
Inquiry  
ordered.

**if the alleged manufacture, use, sale or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats**

The plaintiff may show either non-infringement or invalidity, and therefore the question whether the patent of the person making the threat is a valid patent must come into consideration if the plaintiff in the action seeks to have it considered, because if the patent is invalid there cannot be any act done in infringement of a legal right of the patentee(l). The contrary doctrine originally laid down in *Kurtz v. Spence* (m) that only non-infringement and not

Validity  
raisable.

(c) *Ungar v. Sugg*, 9 R. P. C. 118.

(d) *Ibid.* 8 R. P. C. 389.

(e) *Skinner & Co. v. Shew*, (1894) 2 Ch. 597.

(f) 11 R. P. C. 55.

(g) 5 R. P. C. 177, 184.

(h) 31 Ch. D. 644.

(i) 3 R. P. C. 48.

(k) 10 R. P. C. 9.

(l) *Challender v. Royle*, 36 Ch. D. 435, 443; *Kurtz v. Spence*, 36 Ch. D. 774.

(m) 33 Ch. D. 584.

Raisable in  
reply.

validity could be raised in this action has been expressly overruled. The question of validity may in a proper case be raised by reply (o) but it is conceived that it would be an abuse of the right of reply to suppress the issue of validity in the statement of claim and raise it *de novo* in the reply, since this might well be held to amount to raising a new case (p), or to pleading a new ground of claim (q). In *Dowson v. Drosophore*, cited above, the defendant pleaded validity in the defence and the issue was taken in reply by way of traverse thus bringing this case within the express terms of the decision in *Hall v. Eve* (o).

Particulars  
of objections.

The section makes no provision for the delivery of particulars of objections in a threats action even if the validity of the patent be brought into question and it has been said that in such an action the plaintiff must begin (r). This was indeed one of the grounds upon which it was at first thought that the issue of validity could not be raised in such an action, for it is plain that under such arrangements very important safeguards which the legislature has considered necessary for the protection of patent rights would be wanting (r). But apart from express enactment on the point, particulars may in all cases be ordered under the rules of Court (s), and it may now be considered to be an established practice that if the issues of validity and infringement are raised in a threats action particulars of objections and particulars of breaches will be ordered as in a patent action (t).

Particulars of  
breaches.

The right to  
begin.  
See below,  
p. 136.

Whether plaintiff or defendant shall have the right to begin at the trial must of course depend entirely upon the state of the pleadings. The issues upon the plaintiff are, speaking generally, three, namely, (1) The threats, (2) Non-infringement or invalidity and (3) Damages. With regard to the threats it is not generally difficult so to shape the case as to discharge the plaintiff from the onus of proof. The facts as to the threats are not usually really in dispute, the only question debated being whether an admitted communication is or is not a threat in contemplation of law. Then with regard to damages, the proof of these, if substantial, is generally sent to a referee (chief clerk or other) to try and if not

(o) *Hall v. Eve*, 4 Ch. D. 341;  
*Dowson, Taylor & Co. v. Drosophore*  
*Co., Limited*, 12 R. P. C. 100.

(p) *Kingston v. Corker*, 29 L. R.  
Ir. 364.

(q) R. S. C., Ord. XIX. r. 16.

(r) *Kurtz v. Spence*, 33 Ch. D.  
583.

(s) R. S. C., Ord. XIX. r. 7.

(t) *Kurtz v. Spence*, 36 Ch. D.  
774, 776; *Union Electrical, &c. Co.*  
*v. Electrical Power Storage Co.*, 38  
Ch. D. 327, 329; *Law v. Ashworth*,  
7 R. P. C. 88; *Dowson v. Drosophore*,  
11 R. P. C. 655; 12 R. P.  
C. 101.

substantial need not be given at all (*u*). In any case the burden of proving damages does not alone give the right to begin (*x*). With regard to the other issues, relative to non-infringement, it seems to be the proper course to allow the defendant to undertake them in substance substituting the formal equivalents of validity and infringement. And this also may now be regarded as an established practice (*y*).

The report of *Crampton v. The Patents Investment Co., Limited*, does not make it appear how the question of damages was dealt with there, or in what position as to that point the plaintiff was left at the opening of the case by the defendants. Mr. Roger Wallace, who appeared for the defendants in that action and opened the case, tells me—but speaking from recollection and therefore under some reserve—that his impression is that a sum was agreed between the parties for the amount of damages if any should be recoverable. The attitude which the Courts have adopted on this question of the proof of damages in threats actions will greatly facilitate such arrangements between parties in the future (*z*).

If the patent be invalid, although the defect be curable by amendment of the specification, the patentee cannot possibly justify his threats, and therefore he may be restrained from threatening pending proceedings to amend (*a*); for if the patent is invalid there cannot be an act done in infringement of a legal right of the patentee (*b*).

Other relief. It seems to have been thought that the analogy to a patent action might be pushed to the extent of giving a certificate that particulars were reasonable under sect. 29 of the Patent Act, 1883, and that validity came in question under sect. 31. Such a certificate was given “without prejudice to the validity of it if it should come into operation” in *Crampton v. The Patents Investment Co., Limited* (*c*). It was refused in *Kurtz v. Spence* (*d*). A certificate that particulars of objections were reasonable was granted apparently in *Willoughby v. Taylor* (*e*), but the report is ambiguous, and perhaps means only that certain costs were given.

Invalid  
patent.

Certificate  
under sects.  
29 and 31 of  
Patent Act.

(*u*) *Willoughby v. Taylor*, 11 R. P. C. 55; *Kurtz v. Spence*, 5 R. P. C. 177; and see above, p. 90.

(*x*) *Bedell v. Russel*, Ry. & M. 294.

(*y*) *Kurtz v. Spence*, 36 Ch. D. 774, 776; *Crampton v. Patents Investment Co., Limited*, 5 R. P. C. 391.

(*z*) See above, p. 90.

(*a*) *Fusee Vesta Co. v. Bryant & May, Limited*, 4 R. P. C. 193; *Skinner v. Shew*, (1893) 1 Ch. 419.

(*b*) *Challender v. Royle*, 36 Ch. D. 435.

(*c*) 5 R. P. C. 404.

(*d*) 5 R. P. C. 184.

(*e*) 11 R. P. C. 55.



**Declaration of invalidity.** In *Herrburger, Schwander & Cie. v. Squire (g)*, a declaration that the patent relied upon was invalid was part of the relief originally asked, but was abandoned after discussion at the trial by Willis, Q.C. A declaration of invalidity was made in *King, Brown & Co. v. Anglo-American Brush Corp. (h)*, which is stated in the headnote to have been an action for threats. But at p. 416 of the report it is described as an action for revocation, and this from the whole report of the case and judgment appears to be the correct description. The reference to threats in the headnote is almost certainly an error.

*King, Brown & Co. v. Anglo-Amer.*

**Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent**

**No grievance after action for infringement brought.** See above, p. 85. If a case comes within this proviso it must be dealt with as if the section did not exist, that is to say it must be dealt with under the old law (i); and accordingly, if a threatened action for infringement is commenced and prosecuted with due diligence after such threat, there is no ground upon which an action under this section in respect of such threat can subsequently be commenced at all; there is no "person aggrieved" by the threat by force of the section (k).

**Must be honest action.** The action contemplated in this proviso is an honest not a collusive action (l).

**Must test validity or infringement.** It must be brought to test the validity of the patent or the fact of infringement, whichever may be in question (l). If the action does this in effect it satisfies the proviso and need not be in the ordinary form of a patent action at all. Thus in *Barrett v. Day (m)* the defendant had brought an action in pursuance of his threat against F.—a licensee—for royalties, and an injunction to restrain the manufacture save under the licence. Alleged by way of defence that what he was manufacturing was not within the patent right at all and therefore not within the licence. It was held that this was an action for the infringement of his patent within the section. Hence the fact that a defendant is estopped

(g) 5 R. P. C. 595.

(h) 6 R. P. C. 414.

(i) *Challender v. Royle*, 36 Ch. D. 434; *Brauer v. Sharp*, 3 R. P. C. 196.

(k) *Barrett v. Day*, 43 Ch. D.

447; *Eng. and Amer. Machinery Co. v. Gare Machinery Co.*, 11 R. P. C. 631.

(l) *Challender v. Royle*, 36 Ch. D. 438.

(m) 43 Ch. D. 446.

from calling validity in question does not take the action out of the proviso (*n*).

An action duly commenced and prosecuted, even though unsuccessful or discontinued upon a well-advised view that it will probably fail if prosecuted to a result, is available to oust the statutable right of action (*o*).

But the action to be available to oust the section must be brought in pursuance of the threat, and therefore against the person or any of the persons to whom the threats have been made in respect of the act to which the threat referred, though not necessarily against the aggrieved person (*p*). It must also relate to all the patents, if more than one, on which the defendant is making his threats (*q*).

An action by a third party cannot oust the statute. In *Kensington and Knightsbridge Electric Lighting Co. v. Lane-Fox Electrical Co.* the defendants were not the legal owners of the patent in respect of which the threats were made, but an infringement action had been commenced by the patentee who was a trustee of the patent right for the defendant company. Held that as the damages if any in the threats action would be recoverable not against the trustee but against the company itself—a company with 100*l.* paid up capital—the trustee's action could not be considered sufficient to satisfy the proviso and an interim injunction was granted (*r*).

The action must be commenced and prosecuted with due diligence. Due diligence in commencing must be determined with reference to the date at which the threat was issued (*s*). But it is not possible to fix any definite limit of time within which such an action must be brought. Circumstances can easily be imagined in which the action would have been commenced in due time, although the threats might have continued for a space of three years (*t*). The interval between March and June is not an unreasonable time for a man to take to consider whether he should bring an action in respect of a supposed infringement of his patent (*u*). But an un-

Unsuccessful action.

Must be in pursuance of the threat.

Must cover the whole patent right.

Action by third party.

Due diligence. See also unsuccessful action, p. 96.

Three months' delay.

(*n*) *Barrett v. Day*, 43 Ch. D. 448.

(*o*) *Colley v. Hart*, 44 Ch. D. 189; *Eng. and Amer. Machinery Co. v. Gare Machinery Co.*, 11 R. P. C. 632.

(*p*) *Challender v. Royle*, 36 Ch. D. 439, 442; *Herrburger et Cie v. Squire*, 5 R. P. C. 594; *Combined, &c. Co. v. Automatic, &c. Co.*, 42 Ch. D. 670.

(*q*) *Dowson, Taylor & Co. v. Drosophore*, 12 R. P. C. 98.

(*r*) (1891) 2 Ch. 578.

(*s*) *Challender v. Royle*, 4 R. P. C. 376. It is worthy of note that this point was mentioned *obiter* by Cotton, L. J., at the conclusion of the case, and is omitted from the Law Reports.

(*t*) *Colley v. Hart*, 44 Ch. D. 186; *Combined Weighing Co. v. Automatic, &c. Co.*, 42 Ch. D. 672.

(*u*) *Challender v. Royle*, 36 Ch. D. 437.

Twelve months' delay.

Awaiting threats action.

Prosecution with due diligence.  
Discontinued action.

Comparative merits of parties.

Sundry points of practice.

Pleading the statute.  
See pp. 52, 141.

explained delay of twelve months in commencing the action is not due diligence (x). As a general rule a patentee would not be guilty of undue delay if, with a view to minimizing the cost of litigation, he waited to see whether he could combine the two causes of action in one action, and bring his own action for infringement by way of counterclaim (y).

The action must not only be commenced but it must also be prosecuted with due diligence. This condition was satisfied in the action brought by the defendant in *Colley v. Hart* (z), although that action had been discontinued. But in *Crampton v. The Patents Investment Co., Ltd.* (a) it was held that an action discontinued by consent had not been prosecuted with due diligence, and in *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.* (b) the Court held that, although the plaintiffs in the infringement action—defendants in this—had delayed setting the infringement action down, and might with propriety have taken a somewhat different course from what they did take as regards procedure, still it would not be right to allow the defendants in that action—plaintiffs in this—who had themselves been in fault as regards their particulars—to take advantage of a few days' delay in setting down the action for trial. Held accordingly that the infringement action had been prosecuted with due diligence for the purposes of the section.

*Points of practice.*—It is not proposed in this place to deal systematically with the practice in threats actions, and indeed questions of practice are not strictly germane to the subject of the present commentary, which is concerned with the remedies given rather than with the mode of enforcing them. "But as many points of practice have been incidentally noticed in the foregoing pages, and will be found in their appropriate context, it seems proper to enumerate here a few outstanding points which are important chiefly as having been made the subject-matter of express decisions or judicial dicta, but which cannot well be relegated to any context in these notes.

*Pleading the statute.*—A cause of action may be taken to have arisen under the statute although not expressly so pleaded. *Herrburger, Schwander et Cie v. Squire* was dealt with on that footing (c), and all necessary amendment was ordered to be made at the trial. But it would seem that in that case the statute, although not pleaded in the statement of claim, was pleaded to in

(x) *Herrburger, Schwander et Cie v. Squire*, 5 R. P. C. 595.

(y) *Colley v. Hart*, 44 Ch. D. 188.

(z) 44 Ch. D. 189.

(a) 5 R. P. C. 393.

(b) 42 Ch. D. 673.

(c) 5 R. P. C. 589.

the defence (*d*). As to the mode of pleading a statute, see below (p. 141).

The infringement action need not be brought upon a new writ, but may be raised by way of counterclaim (*e*).

The question whether there has been such a threat as the statute contemplates is one which may sometimes be tried separately without going into the rest of the case, and it should be considered by those responsible for the conduct of any given case whether this is not a proper course to follow; that is to say, whether the question cannot be neatly and simply raised as a separate issue (*f*).

Where separate actions are brought upon the threats and the patent, the proper course is for the parties to come to an agreement for the purpose of saving double costs, and in such a case the patentee ought to agree to a stay of the threats action pending the trial of the infringement action, in order that the former may be kept alive for the benefit of the plaintiff in that action if the patentee should fail of establishing his case upon infringement (*g*). Or the two actions may be set down for trial together (*h*).

Where the threats are alleged to have been uttered by the agents of the defendant, the plaintiff may be ordered to give, by way of particulars, the names of the agents (*i*).

The thirty-second section does not apply to threats issued in respect of the alleged infringement of a trade mark (*k*).

It has been said that the patentee need not apply in a threats action for liberty to amend his specification pending the action (*l*), but in the case cited the question was not simply whether leave was necessary, but leave having been given in one action whether supplementary leave was necessary in another, and that a threats action. In those circumstances it was held that no such further leave was necessary. The question whether a threats action is "a legal proceeding in relation to a patent" within the eighteenth section of the Patents Act, 1883, is left doubtful.

(*d*) 5 R. P. C. 596.

(*e*) *Herrburger, Schwander et Cie v. Squire*, 5 R. P. C. 585; *Colley v. Hart*, 44 Ch. D. 188.

(*f*) *Kurtz v. Spence*, 5 R. P. C. 170.

(*g*) *Combined, &c. Co. v. Automatic, &c. Co.*, 42 Ch. D. 674; *The Same v. The Same*, 6 R. P. C. 371; *Edlin v. Pneumatic Tyre, &c., Limited*, 10 R. P. C. 316.

(*h*) *Sharp v. Brauer, Brauer v. Sharp*, 3 R. P. C. 193; *Barrett v. Day, Day v. Foster*, 43 Ch. D. 437; *Colley v. Hart, Hart v. Colley*, 44 Ch. D. 179, 193.

(*i*) *Dowson, Taylor & Co. v. Drosophore*, 11 R. P. C. 537.

(*k*) *Colley v. Hart*, 6 R. P. C. 20.

(*l*) *In the Matter of Hall and others*, 5 R. P. C. 307.

Infringement action by way of counterclaim.

Threat or no threat a separate issue. See below, p. 146.

Agreement to save double costs.

Setting down together.

Particulars of agents.

Trade mark.

Leave to amend, whether necessary in a threats action.

## CHAPTER IV.

## COMPULSORY LICENCES.

*Patents Act, Sect. 22.*

See above,  
p. 19.

THE Legislature has made provision (*a*) against the mischief of obstruction to industry by reason of patents, by empowering the Board of Trade to order a patentee in certain specified cases to grant licences upon terms, as to royalties and otherwise, to be settled by the Board, and the Patents Rules, 1890, have provided machinery for giving effect to the statute. But this remedy seems to be in a fair way to divide with the fourth section of the Statute of Monopolies the distinction of remaining for an indefinite period of time a remedy *in posse*.

There is at present no record in the books of any application to the Board of Trade to exercise these powers (*b*). But it can hardly be doubted that this is the result merely of oversight, for when those powers come to be examined it will be seen that, properly exercised, they would serve an exceedingly useful purpose. The circumstances which call for their exercise arise in one way or another out of the failure of the patentee to turn his invention to the best account, the best account being understood to be a result which yields equal benefit to the patentee and the public at large. Thus if the patent is not worked at all, or is worked insufficiently, or prevents the advantageous working of another invention, in any of these cases the Board of Trade may be invoked by a third party.

(*a*) Patents Act, 1883 (46 & 47  
Vict. c. 57), s. 22.

(*b*) But it is said that three such  
applications have been made.



In practice one constantly hears of blocking patents which have to be bought up by the undertakers of new enterprises for the mere purpose of getting rid of them. Another very common case is that in which the inventor of an improvement is deterred from the attempt to bring his invention into use by the apprehension that if he succeeds he will only become the catspaw of some earlier patentee who chances to have a controlling grant. In all such cases the section, upon the face of it, provides an available remedy.

Obstructive  
patents.

There is another case in which it would seem that this remedy would be very useful. It has happened many times that the owner of a patent has slept upon his rights until some enterprising neighbour has created a remunerative business by utilizing the patented invention, and when the patentee sees a valuable capture within his reach, he for the first time concerns himself with the working of the invention. Proceedings of this sort cause great uneasiness to a very highly meritorious class in the community. The people who are best fitted by habit and circumstance to carry out new undertakings are often the victims of paralyzing misgivings on this score. The terror of a patent action, so vividly described by Bowen, L. J., in the case of *Skinner v. Shew* (c), falls upon them, and they argue that if they are to be exposed to an injunction at the instance of the patentee, all their labour and the capital they may have embarked in the undertaking will be thrown away.

Predaceous  
patentees.

Against apprehensions of that sort this section was clearly intended to provide a remedy; in fact there would seem to be no reason, with such a section as this upon the statute book, why any honestly-conducted enterprise should ever be ruined by an injunction at the instance of a patentee. It is somewhat surprising that it should not have become by this time almost a matter of common form in any such patent action for the defendant to meet the

Bearing on  
the question  
of injunction.  
See p. 151.

(c) (1893) 1 Ch. 424. See above p. 11.

application for an injunction by a petition to the Board of Trade under the Patents Act. It would seem as if in this way he could make himself secure against anything in the nature of obstructive or oppressive action by a patentee. But the fact remains, whatever the reason may be, that as yet nobody has tried the effect of this strategy, and therefore at the present time nobody can tell what the result of such an application would be (*c*).

It would seem therefore that commentary upon this section can only have at the present time an academic interest but if that consideration were sufficient to preclude the treatment of the topic in this place this book would never have been written for the objection upon practical grounds has much more weight in reference to the Statute of Monopolies than it has to the Patents Act of 1883; unless indeed it is to be inferred that the complete neglect of a statute of so recent date must be accounted conclusive proof of its complete ineptitude. But that is an argument the answer to which may be deferred until the argument itself is put forward.

## 22. If on the petition of any person interested

Form of  
petition.

The petition is to be addressed to the Board of Trade and is to show clearly—

- (1) The nature of the petitioner's interest,
- (2) The ground or grounds upon which he claims to be entitled to relief,

“and shall state in detail,”

- (3) The circumstances of the case,
- (4) The terms upon which he asks that an order may be made,
- (5) The purport of such order (*d*).

Procedure  
thereunder.

There are of course no precedents for such a petition, but the general form of the document is sketched in the Patent Rules, 1890. Form H. 1.

The petition is intituled in the matter of the Patents, Designs and Trade Marks Acts, 1883 to 1888—Patents—and in the matter of the Patent in question. It embodies a statement of the petitioner's case setting out the grounds of the application and concludes

(*c*) See below, p. 153.

(*d*) P. R. 1890, r. 60.

with a prayer in appropriate terms. The published form does not comprise any intimation that the applicant is prepared to adduce evidence in support of his case, and desires an appointment and directions for the purpose of submitting his evidence but it is conceived that a paragraph to that effect may properly be added. As to subsequent proceedings the Patents Rules, 1890, may be consulted (*e*).

The circumstances of the case which have to be detailed are the circumstances which tend to show that one or other of the conditions (a), (b), and (c) enumerated in the section has arisen, and must in every case show that the patentee is in fault and has failed to grant licences upon reasonable terms. These are of course part of the grounds upon which the petitioner claims to be entitled to relief. Substance of the petition.

The terms upon which he asks that "an order may be made" will relate probably to security for payment and such like collateral matters. The terms as to amount of royalties and conditions under which the invention is to be used and the like will be included in the order itself.

The purport of such order would be most conveniently expressed by preparing a draft of the proposed order and incorporating it in the petition. The practice upon motions of adding a clause to indicate that the award need not follow with exactitude all the terms of the proposed draft should also be followed. Draft order.

### any person interested

These words must of course be construed with reference to the contingencies enumerated in sub-sections (a), (b), and (c) of this clause. It would seem therefore that any person *bonâ fide* proposing to work the invention in the United Kingdom would be a person interested under sub-sections (a) and (b) and that any person liable to be attacked as an infringer would be a person interested under sub-section (c). Although there are no cases exactly in point, a general reference may be made in this connection to the decisions as to who is an aggrieved person under section 32 of the Act (*f*), and who is a person entitled to oppose the grant of a patent under section 11 of the Patents Act. Who is a person interested.

(*e*) See P. R. 1890, rr. 60—66;      (*f*) See above, p. 84.  
and below, App. III. p. 247.

it is proved to the Board of Trade that by reason of the default of a patentee to grant licences on reasonable terms

The petitioner's case.

It is worth noting here that the expression used is perfectly general. The petitioner has to show three things:—

- (1) The patentee's failure to grant licences on reasonable terms;
- (2) That he ought to have granted them, and that therefore his not having granted them puts him in default;
- (3) That one or other of the consequences about to be enumerated has resulted from this default.

Case of a patent exclusively licensed.

It would seem then that if a case of this sort is proved it would be no answer for the patentee to say that he preferred to keep the working of his invention in his own hands and refused on principle to grant licences. His arbitrary refusal could not justify his default. If that be so, a curious and very difficult question might arise if it were shown that the patentee had parted with his liberty by granting an exclusive licence to licensees who were not working the invention to public advantage. It is not possible to say what view the Board of Trade might take of such a position, but if it were shown either that the patentee could not obey an order made by the Board or that the Board refrained from making an order which ought to be made, then it is conceived that a case would arise for the repeal of the patent upon the ground that it was hurtful to trade and generally inconvenient (*g*).

The consequences above referred to are that:—

- (a) The patent is not being worked in the United Kingdom; or
- (b) The reasonable requirements of the public with respect to the invention cannot be supplied; or
- (c) Any person is prevented from working or using to the best advantage an invention of which he is possessed,

The first of these contingencies has been most strikingly illustrated by a very interesting letter from the pen of Sir Bernhard Samuelson which appeared in a recent impression of *The Times* (*h*). I borrow the following extract which is much better quoted than paraphrased:—

“In your leader on the report of my late colleagues on technical progress in Germany you refer to the fact that the production of

(*g*) Statute of Monopolies, sect. 6; see below, App. III. p. 238.

(*h*) Times Newspaper, 25th January, 1897.

dyes from coal tar in which we have been so completely distanced by the Germans, was originated by Dr. Perkins, and it might be added by Dr. Hoffmann in this country.

“It is not generally known that we lost this manufacture because the trade in England was shut up for fourteen years by a ‘master patent’ whilst no controlling patent had been sanctioned in Germany, so that anyone could take up the manufacture there; the result being, of course, development abroad in place of stagnation at home.

“At the present time we in this country are handicapped as much as before, but from an opposition (*sic*) of things. The Germans having taken the lead with their acquired experience and large capital, keep it by patenting their new processes in this country but carry out their manufacture abroad. So long as they keep our market supplied, which they take care to do, nobody is at liberty to make the patented articles here.”

The writer is much mistaken as to the law, but if the facts be as he puts them it can hardly be doubted that the state of things of which he complains arises from a widespread misapprehension of the law of the land—a misapprehension so widespread indeed as to be no less mischievous than a defect in the law itself.

With regard to the last of these clauses it may be surmised that the Legislature intended chiefly to secure to the patentee of an improvement the benefit of his tributary patent upon equitable terms, and this is the most obvious case to which this clause applies. But it is worthy of note that the invention is not necessarily a patented one, and therefore the true criterion of the interest to which this sub-section points is not the patentability of the later invention but the liability of its inventor to be attacked for infringement should he proceed to work his invention. For an instance of the hardship remedied by this section reference may be made to the very remarkable language used by Pearson, J., in giving judgment in *Badische Anilin v. Levinstein* (i).

Later  
inventor  
blocked.

*Badische  
Anilin v.  
Levinstein.*  
See below,  
p. 152.

the Board may order the patentee to grant licences on such terms as to the amount of royalties, security for payment or otherwise, as the Board having regard to the nature of the invention and the circumstances of the case may deem just,

The terms to be imposed must clearly be determined in every instance upon the merits of the particular case, and in the absence

Duty of the  
Board of  
Trade when  
imposing  
terms.

(i) 24 Ch. D. 175. See also below, p. 152.



of any authorities it does not appear that any good could come of discussing them. But it may be pointed out that the Board is to consider what is just between the parties and to impose terms accordingly upon either or both. The patentee in his negotiations with the petitioner is only bound to be reasonable—not just. The Board must hold an even hand between the parties and not accede to the patentee's suggestions merely because they are reasonable as coming from a negotiator posted in an advantageous position. If a case arises for the intervention of the Board at all the only thing that the Board has then to consider is what terms are just?

### and any such order may be enforced by mandamus

Proceeding  
by man-  
damus.

This is a highly suggestive clause and deserves very careful consideration, for in a sense it places the patentee in the position of a public officer, since this remedy is regularly given to compel the performance of his duty by an officer intrusted with the discharge of judicial or administrative functions. And it has always been considered particularly apt to enforce the performance of his duty by an officer appointed by patent(*k*). This argument must not however be pressed too far, for it is a rule that the remedy by mandamus lies when no other is given(*l*), so that its application cannot be held of itself to import that the mischief falls within any definite category. But in the present case it is no doubt chosen upon analogy and selected as a fitting remedy, not adopted merely in the last resort.

The questions to which such considerations give rise are however too many and too intricate to be treated here. The reader may find the whole subject of mandamus discussed at large in Shortt upon Prohibitions, Mandamus and Injunctions, Short & Mellor on Crown Office Practice, or in the older work (1843) of Tapping on Mandamus(*m*).

Procedure.

*Procedure.*—The procedure in these cases will be found sketched in the Patents Rules, 1890, rr. 60—66 inclusive(*n*). They contain provisions relating to—

1. The form and substance of the petition(*o*).
2. The delivery of the petitioner's evidence to the Board of Trade.
3. A preliminary hearing *ex parte* before the Comptroller or other person appointed by the Board and authorized to give directions as to further proceedings upon the petition.

(*k*) *Rex v. Chester*, 1 T. R. 404.

(*l*) *Rex v. Wyndham*, Cowp. 378;  
*Reg. v. Bench. of Lincs. Inn*, 4 B.  
& C. 859.

(*m*) See also 2 D. C. P. 1638.

(*n*) See App. III. p. 247.

(*o*) See above, p. 101.

4. The delivery of copies of the petition and evidence to the patentee.
5. The delivery by the patentee of evidence in opposition to the petition.
6. The delivery by the petitioner of evidence in reply.
7. The hearing of the petition.

The whole procedure is manifestly based upon the analogy of *Hearing*. opposition to the grant of a patent, but having regard to the very technical character of such an inquiry as is here provided for and also to the circumstance that there is no provision for appeal, it is probable that in these cases the Board of Trade would see fit to send the petition for hearing to a specially selected arbitrator rather than to any official of the Board who, like the Comptroller of Patents, could not be supposed to have especial knowledge of the circumstances of the trade affected by the patent rights. The inquiry would in fact much more nearly resemble an arbitration under the Railways Clauses Acts or other statutable powers of purchase than an ordinary litigious proceeding like the determination of patent rights, and it may be submitted that the analogy of compulsory purchase should in these cases be followed as far as the circumstances will permit.

It would probably be a very convenient course to refer the matter as a whole to the Comptroller-General, so that in case of difficulty as to procedure there may be recourse to him for directions, but to authorize him to refer all questions of rates of royalty, terms of payment, keeping, rendering and inspection of accounts, security and the like, to an arbitrator chosen with reference to his special knowledge of the trade affected by the patent grant, since in the settlement of all such details customs of trade will have to be considered which would need to be proved, in many cases, with excessive trouble and expense if proved to the satisfaction of an arbitrator wholly unversed in the subject.

## CHAPTER V.

## THE PATENT.

Importance  
of the patent.

IN order to obtain a complete view of the remedies given for the abuse of patents it is evidently necessary that the extent of patent right should be accurately ascertained, and this is precisely where the greatest difficulty is encountered. These rights, growing out of a written document and made the subject of so much litigation as has in recent years arisen about patents, ought certainly to be perfectly easy to define at least in general terms. But unfortunately the language of the grant is so antiquated that it can now only with difficulty be understood, and the decisions of the Courts, often hopelessly conflicting, have increased the obscurity, while the loose practice of recent years has added to the domain of the patentee whole areas to which so late as the middle of the present century he had not dreamt of putting in a claim. Some of the innovations of recent practice have been pointed out in the preceding pages (*a*) and others of older date will come to light when the deed which forms the basis of the patentee's rights is closely examined. But when all allowance is made for accretions to the patent right the patent itself remains the foundation and principal source of it and must be examined accordingly (*b*).

(*a*) See above, p. 45.

(*b*) *Feather v. Reg.*, 6 B. & S. 283; *Caldwell v. Van Vlisningen*, 9 Hare, 427; *Sykes v. Howarth*, 12 Ch. D. 832; *Walton v. Bateman*,

1 W. P. C. 615; *Elmslie v. Boursier*, L. R. 9 Eq. 222; *Walton v. Lavater*, 8 C. B. N. S. 175; *Von Heyden v. Neustadt*, 14 Ch. D. 233.

The form of patent grant in present use is authorized by the Patents Act, 1883, in the following terms:—

### 33. Every patent may be in the form in the first schedule of this Act.

It is worthy of note that the statutable form is authorized but its use is not made compulsory. In point of fact the Patent Office issues patents in many different forms slightly modified from that given in the Schedule of the Act of 1883 to meet the requirements of special cases. For example—joint inventors, imported inventions, executors of deceased inventors, and so forth. This subject is very fully treated by Mr. Lewis Edmunds in his book on Patents, p. 533.

Victoria, by the grace of God, &c., to all to whom these presents shall come, &c.

A patent is frequently spoken of as a contract between the Crown and the patentee. The doctrine was so stated in *Harmer v. Plane* by Lord Eldon (c), and it was made the basis of a systematic work on Patent Law in 1855 by Mr. John Coryton. But after all this is but a figure of speech which expresses, no doubt with great felicity, the essential nature of the arrangement made, but not in any sense the formal character of that arrangement (d).

### Whereas

The effect in general of recitals in a patent is to bind the grantee, not the grantor. This arises from the doctrine that the suitor is bound to inform the king concerning the royal estate, and if in any matter necessary to be stated by way of recital it is found that the king is misinformed this is attributed to the fault of the patentee (e).

### hath by his solemn declaration

Originally under the Patents Act of 1883 a statutory declaration was required from the applicant. This is now dispensed with by virtue of the amending Act of 1885 (f), and a common declaration is received instead.

(c) 14 Ves. 132. See also *Williams v. Williams*, 3 Mer. 160.

(d) *Feather v. Reg.*, 6 B. & S. 285.

(e) *Alcock v. Cooke*, 5 Bing. 349; Com. Dig., tit. Grant (G. 9).

(f) 48 & 49 Vict. c. 63, s. 2.

represented unto us that he is in possession of an invention for

The title.

Much curious learning on the subject of the title of a patent and its bearing on the scope of the invention claimed and the validity of the grant may be collected from the older cases. But since the introduction of the provisional specification this has largely lost its significance. Compare, for example, the decision in *Bainbridge v. Wigley* (g) with the dictum of the Attorney-General in the matter of *Brown's Patent* (h).

that he is the true and first inventor thereof, and that the same is not in use by any other person to the best of his knowledge and belief.

The consideration.  
See below,  
p. 109.

These recitals deal with the statutable conditions of a patent grant, but it is said that their introduction here as part of the consideration for the grant gives to them this additional effect, that if the novelty of any part be disproved the grant will be vacated *in toto* because the consideration is "entire," that is to say indivisible. If the question of validity stood upon the statute only, the patent might be void *pro tanto* but good as to part thereof (i).

And whereas the said inventor hath humbly prayed that we would be graciously pleased to grant unto him (hereinafter, together with his executors, administrators and assigns or any of them, referred to as the said patentee) our Royal Letters Patent for the sole use and advantage of his said invention.

The petition.  
See below,  
p. 125.

This is a false recital, for no applicant for a patent asks to have granted to him "the sole use and advantage" of his invention. He applies now on an official form (k) that "a patent may be granted" simply. The effect of the grant he does not pretend to define, and if he defined it in the terms of this recital, he would not only be asking for what the Crown cannot grant, he would also stultify himself completely, for it is his case upon the application that the advantage which the public will derive from the invention is a merit in him, the inventor, in consideration of which the grant may properly be made. But this appears to be an illus-

(g) Goodeve, 30.

(h) 2 Griff. 1.

(i) *Chester v. Frieland*, Ley, 73;  
*Hill v. Thompson*, 8 Taunt. 401;  
*Bailey v. Robertson*, 3 App. C. 1075;

and see the cases cited on p. 109,  
n. (o).

(k) Form A, A 1 or A 2, under  
the Patents Rules, 1890.



tration of the exception mentioned in the case of *Alton Woods* (l) to the rule that a false recital vitiates the grant, for it is not a part of the consideration of the grant.

**And whereas the said inventor hath by and in his complete specification particularly described the nature of his invention.**

By the Patents Act, 1883 (m), the patentee must “particularly describe and ascertain” the nature of the invention. The objection that he has not particularly ascertained it is one that is constantly raised in patent actions, though not usually to much purpose. If a patent were held to be invalid on this ground alone, it would seem, on the authority above cited (n), that the patent in that case need not be declared void *in toto*, but could be held to fail in respect of the unascertained part only, for the ascertaining of the invention is no part of the consideration for the grant. It would be interesting to discover whether the Courts at the present date would pay attention to such highly theoretical arguments. The exact point does not appear to be expressly dealt with in any reported decision, but there is no doubt that a patent may be void as to part, but good and effective as to other part of the grant (o).

The specification.

Patent void *pro parte*.

In full accord with this principle Lord Blackburn laid down the doctrine of disconformity in the case of *Bailey v. Robertson* (p). He there says that if “the patentee says, in the provisional specification, I describe my invention as A and in the complete specification he says I hereby describe A and also B, then as far as regards B it is void, because the letters patent were granted for the invention that was described in the provisional specification and do not cover the invention that is described in the other.” It must be observed that this judgment was pronounced in 1878, at which date a patent was granted upon the lodging of the provisional specification. Now the lodging of the complete specification is a condition precedent to the grant and is recited in the patent. It cannot therefore be said that the patent does not now cover the invention described in the complete specification. But on the other hand, even under the new

(l) 1 Co. Rep. 43a. See also *R. v. Mussary*, 1 W. P. C. 47, and for a more accurate statement of the rule *Cholmley’s case*, 2 Co. Rep. 54.

(m) Sect. 5, sub-sect. 4.

(n) See above, p. 108 n. (i), and the cases cited in the next note (o) on this page.

(o) *Case of Sackville College*, Raym. 177. See also *E. Shrewsbury’s case*, 9 Co. Rep. 47; *Att.-Gen. v. Sir E. Farnen*, 2 Lev. 172, reported *sub nomine*, *Att.-Gen. v. Sir E. Turner*, 2 Mod. 107; *Brunton v. Hawkes*, 4 B. & A. 552, 558.

(p) 3 App. Cas. 1075.

practice, it cannot be said that the disconformity deceives the Crown, for both documents are submitted to the Patent Office and actually to examination and comparison there before the issue of the patent, nor does the conformity of the one to the other form any part of the consideration. It has indeed been said more than once that disconformity still makes the patent bad (*r*), but the effect of these dicta is that the Act of 1883 has not cured the fault in a patent, and it has never been suggested that the effect is more serious now than it was in 1878. Probably therefore the sound doctrine is that a patent may still be good *pro parte* and bad *alterâ pro parte* if the invalidating vice be one that does not go to the consideration for the grant.

And whereas we being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request.

This manifestly means his request for a patent, not for *the sole advantage of the invention*, which would leave nothing for the "public good." But as this recital has the supreme merit of being redundant, it has never become a source of difficulty and probably never will (*s*).

Know ye therefore that we of our especial grace, certain knowledge, and mere motion

"Especial grace."

"*Especial grace*" implies that the grant is made from the bounty of the Crown (*t*). It negatives therefore the view that the patent is a contract between the Crown and the patentee (*u*), and asserts by implication the right of the king to refuse the grant at his absolute discretion (*x*). The three phrases "*especial grace, certain knowledge, and mere motion*" are often cited together for the purpose of exposition, and it is said that they are inserted in patents in order that the grants may be construed more favourably for the grantees. This statement seems hardly accurate. The effect of *especial grace*, for example, is only to negative the idea of valuable consideration moving from the patentee, and as above stated, to refer the grant to the royal bounty. It has accordingly been held that the patent grant must be construed in favour of the Crown and strictly against the patentee (*y*). Such is the technical rule,

(*r*) *Vickers v. Siddell*, 15 App. Cas. 499; *Nuttall v. Hargreaves*, (1892) 1 Ch. 29.

(*s*) See above, p. 109.

(*t*) *The case of Alton Woods*, 1 Co. Rep. 51.

(*u*) See above, p. 107.

(*x*) *Brunton v. Hawkes*, 4 B. & Ald. 553.

(*y*) Bac. Ab., tit. Prerogative, F. 2. See below, App. V. p. 269; *Case of Alton Woods*, 1 Co. Rep. 46b;

and although the good feeling of judges has in more recent times overridden the rule and led the Courts to adopt a favourable attitude towards the grantee in the construction of patents (z), this has come about in spite of and not by virtue of the doctrine that the grant is made "of our especial grace" (z).

"*Certain knowledge*."—These words import that the Crown has knowledge of the thing granted and relies upon that in making the grant and not upon the suggestions of the patentee (a). It is therefore repugnant to the recital that the patentee "has represented unto us that he is in possession of an invention. . . . that he is the true and first inventor thereof and that the same is not in use," &c. (b). A grant with these words is said to be "assertive" and not "suggestive" (c), but the distinction was long ago frittered away by the fanciful argument that the king's certain knowledge is to be intended of the truth which is the proper object of knowledge and not of "falsity which is a *non ens*, and of that the king cannot have knowledge, but in such a case the king, notwithstanding those words, is utterly deceived in his grant, and therefore they shall not give the patentee any advantage" (c). The words in any case were probably not particularly appropriate in a grant of a trading privilege, which curtails the rights of other tradesmen, for they appear to have been originally introduced in order to exonerate the suitor from the duty of making the king acquainted with the exact nature and value of so much of the royal estate as it was proposed to grant away. The rule, which was occasioned by the scandalous liberality of Richard II. towards his favourites, and was embodied in the first statute of Henry of Bolingbroke (d) in the following words: "Item, to the intent that our said lord the king in time to come shall not be deceived in his grants or gifts, annual or in fee, or in any offices by him to be given, made, or granted, he will, by the assent of the lords spiritual and temporal aforesaid, and at the request of the said commons, be counselled by the wise men of his council in things touching the estate of him and of his realm, saving always his liberty; also he hath ordained and stablished by the assent aforesaid, that all they which from henceforth do demand of the king, lands, tenements, rents, offices, annuities, or any other profits, shall make express mention in their petitions of the

"Certain knowledge."  
See below,  
p. 273.

*Arthur Legat's case*, 10 Co. Rep. 112; *Case of Mines*, Plowd. 336.

(z) *Caldwell v. Van Vlissingen*, 9 Hare, 415.

(a) Vin. Ab., tit. Prerogative of the King (E. c. 3), 6, n.

(b) *Feather v. Reg.*, 6 B. & S.

286, 287.

(c) *Arthur Legat's case*, 10 Co. Rep. 112.

(d) 1 Hen. 4, c. 6. See *Butler and Baker's case*, 3 Co. Rep. 33, interpreted and qualified by 2 Hen. 4, c. 2.

value of the thing so to be demanded, and also of that which they have had of the king's gift, or of other his progenitors or predecessors before. And in case they make not such mention in their said petitions, and that duly proved, the king's letters patents thereof made shall not be available, nor of any force nor effect, but wholly revoked, repealed, and adnulled for ever; to the punishment of them which so have done deceit to the king, as they that be not worthy to enjoy the effect and benefit of the letters patents to them granted in this behalf."

From this point of view the rule is eminently politic and just, but it manifestly has no bearing upon grants of the nature of modern patents. The statute itself was repealed in 1887 (*f*). Whether the rule founded upon it has disappeared also may be open to question. For the ingenuity of the Tudor lawyers devised an independent reason for the rule in the courtly doctrine that the king is too busy with affairs of State to give ordinary attention to his own affairs (*g*), whence they argued that it was the duty of the suitor to instruct the king so that his purpose and intent in making the grant shall take effect. The doctrine moreover probably comes within the saving concerning rules of law or equity in the repealing Act.

"Mere motion."

"*Of mere motion*" properly imports the honour and bounty of the king, who rewards the patentee for the merit of his service of his own mere motion, without any suit of the party, and it was said that those words were added after the statute of 4 H. 4, c. 4, by which Act the king declares that he will abstain from granting any part of his revenues, lands or wardships unless to those who have deserved, and those who sue for any such thing shall be punished, and shall not have the thing for which the suit was made; after which Act, to the end it might not appear that any suit was made, these words were added, *sc. ex mero motu* (*h*). So says Sir Edward Coke. The Act of Parliament here referred to by him must not be confounded with the earlier statute above cited, and quoted at length on p. 111, by which it was made a rule of law that the suitor must, in petitioning for a grant, make express mention of the value of the gift in contemplation. The sanction of the earlier law is that the grant shall be ineffectual, but this one, cited by Coke, provides that the defaulting suitor shall be punished and disabled ever to have the thing so demanded. This very good reason for the introduction of these euphemistic words into the

(*f*) S. L. R. (50 & 51 Vict. Rep. 52.  
c. 59). (*h*) *Arthur Legat's case*, 10 Co.  
(*g*) *Case of Alton Woods*, 1 Co. Rep. 113.



deed seems to have escaped the attention of most commentators in recent times, who have been sorely puzzled to give any intelligible account of a clause which has manifestly failed of its original intention through what seem at first sight utterly perverse decisions of the Courts. The truth seems to be that this clause "*ex mero motu*" was highly important, at least theoretically, until the labours of the Statute Law Revision Committee in 1863 (*i*) removed from the statute book the ancient law which was intended to protect the nation against the machinations of later day Despencers.

This recital that the grant is made of the mere motion of the Crown is not only notoriously untrue, it is contradicted by the previous recital that "the inventor hath humbly prayed that we would be graciously pleased to grant unto him our Royal Letters Patent," &c. (*k*), and it is therefore to be disregarded by the Court, which will hold that "the words *ad humilem petitionem ejusdem* diminish the force of the words *de gratia speciali ac ex certa scientia et mero motu*, for the charter shall not be taken to proceed purely from the king's grace" (*l*).

Repugnant to the recital of the petition. See above, p. 108.

Some lawyers have deduced from this clause "of our special grace, certain knowledge and mere motion" the right of the patentee to have his grant favourably construed. But when closely examined the inference seems to be of doubtful validity, and the conclusion that what emanates from the royal bounty must be strictly scanned seems to be both better founded in logic and better established by authority as the practical deduction from this premiss.

Beneficial construction.

It will indeed be found that the doctrine, even when stated in the most promising terms, means little or nothing. To take for instance the rule as laid down in *R. v. Mussary* (*m*), it is there said that "where the king grants *ex certa scientia et mero motu* those words occasion the grant to be taken in the most liberal and beneficial sense according to the king's intent and meaning expressed in his grant." The last clause here is particularly noteworthy, for it qualifies the rest in such a sense as to amount almost to a reversal of meaning. It signifies that the plenitude of the language may always be cut down if a suspicion can be sustained that the real intention was less ample or other than the intention expressed. Hence this very rule in practice gives rise to all kinds of defeasances of the royal grant. For example, it has been held that a gift

(i) 26 & 27 Vict. c. 125. But as to Ireland, 35 & 36 Vict. c. 98.

(k) See above, p. 108.

(l) *Case of Mines*, Plowd. 337.

(m) 1 W. P. C. 41. The ob-

servations in the text do not, of course, apply to the rule as formulated by those writers who have incautiously cited it without the concluding clause.



The rule of most beneficial construction defeats the gift.

in fee to a man and *his heirs male* fails wholly *because* it was made *ex certa scientia et mero motu*, for the terms of it showed an intention to exclude heirs female, therefore it could not operate as a gift in fee simple, and as the proper technical words to create an estate in tail male had not been used it would be improper to expound the deed as conferring a less estate than the conditional fee simple which the words express(o). To the lawyers of the sixteenth century it appeared better logic to say that the rule of liberal construction resulted in an impossible estate, and therefore in a void grant than by a doctrine of *cy près* to confer upon the patentee as much as could be given of what the Crown had affected to bestow. But it was recognized that the same words in a deed by a private grantor would have availed to convey the fee simple and the impertinent limitation would have been ignored. The qualification "according to the king's expressed intent," renders the rule of most liberal construction fatal to the gift. By similar reasoning the conclusion is reached that "the grants of the king are taken and interpreted by a favourable and beneficial interpretation, so that no prejudice shall accrue TO HIM by construction or implication on his grant *more than he truly intended by it* (p).

The rule enures to the grantee's benefit in some cases.

There are however a few cases in which the patentee has derived an advantage from this doctrine of benevolent construction. Thus in *Auditor King's case* (q) a grant had been made of lands, and in the premises it had been stated that the estate to be conferred was heritable. The word "heirs" was however omitted from the habendum, and thus a question arose whether the land would descend or not. And in this instance the grant was construed according to the queen's expressed intention and the estate adjudged to be inheritable. An even more interesting example may be collected from a comparatively very recent case, and one in which the rule was, so to speak, informally applied, for the judge who gave the decision does not seem to have cited any authorities. The case is *Caldwell v. Van Vlissingen* (r), and the question was whether the words in the patent which prohibit the "subjects" of the Crown could be applied to foreigners (s). Having defined the intention of the grant, Turner, V.-C., proceeded to say: "It was said that the prohibitory words of the patent were addressed only to subjects of the Crown, but these prohibitory words are in aid of

*Caldwell v. Van Vlissingen.*

(o) Br. Ab., tit. Patent, pl. 104, cited *Case of Alton Woods*, 1 Co. Rep. 43, 44, 50; *Alcock v. Cooke*, 5 Bing. 348; Bac. Abr., tit. Prerogative, F. 2. See below, App. V. p. 269.  
(p) *Knight's case*, 5 Co. Rep.

(Part 2), 56.

(q) Cited in the *Earl of Rutland's case*, 8 Co. Rep. 56b.

(r) 9 Hare, 427.

(s) See above, p. 33, and below, p. 126.

the grant and not in derogation of it. . . . The language of this part of the patent does not, therefore, appear to me to alter the case." In these words we seem to catch the far-off echo of Sir Edward Coke (*t*).

A matter so involved cannot be dismissed in a sentence, but it must be admitted that it has here occupied a space out of all proportion to its comparative importance. Questions of the construction of the grant are now few and far between; it would tend, perhaps, to uniformity and regularity in the practice of the law if they were more frequently considered than they are. In practice, for one question that arises upon the construction of a grant, five hundred arise upon the construction of a specification, and although for some purposes the patent and specification are to be taken as one document (*u*), that principle does not govern questions of construction. The Crown can well enough say how its own grant is to be construed, but it would be preposterous and improper to extend any indulgence in the matter of construction to the patentee in respect of a document which he has himself drawn up, subject to no control and under no responsibility of any sort, save in so far as the validity of his grant depends upon the sufficiency of his specification (*x*). It is in respect of the specification, in the great majority of cases, that the rules of construction are momentous for the patentee and the rules to be applied in construing a specification are not to be found anywhere in the patent but in the voluminous case law upon the subject which has for the more part been built upon the broad foundation that an inventor is a meritorious grantee who, all recitals to the contrary notwithstanding, has given a valuable consideration for the privilege granted to him (*y*).

Construction of the specification.

do by these presents . . . give and grant unto the said patentee

These words have given rise to extraordinary difficulty in the construction of patents and have occasioned irreconcilable conflict among the authorities as to the nature and measure of the patentee's rights. It is therefore impossible at present to ascertain their true effect.

(*t*) See also *Earl of Rutland's case*, 8 Co. Rep. 56a; *Elmslie v. Boursier*, L. R. 9 Eq. 222; *Von Heydon v. Neustadt*, 14 Ch. D. 233.

(*u*) Hindmarch, 158.

(*x*) This observation might be considered too obvious for remark

were it not that the point here made has been overlooked, with the result that the law has been seriously mistaken by more than one recent text-book writer.

(*y*) *Neilson v. Harford*, 8 M. & W. 806; *Otto v. Linford*, 46 L. T. 39.

State of the  
authorities.

In discussing them it is in the first place important to consider with what object they are introduced. It has been commonly assumed that they constitute the effective granting part of the deed. Thus in *Minter v. Williams*, Coleridge, J., says: "In the granting part of this patent the words are 'make, use, exercise and vend'" (z), and in numerous other cases the same thing has been tacitly assumed. Other authorities again have ignored these words and referred to the prohibitory clause which follows as containing the grant. Thus Maule, J., in *Holmes v. L. & N. W. Ry.*, says: "You must restrain the sense of those words 'make, use, exercise, and vend' in the patent to such a user as amounts to an infringement of the prohibition as to the working and making" (a). The learned judge appears to have been quoting the statute with the patent in his mind, for the words "working and making" are found in the Act (b) and not in the patent. The statute, however, contains no prohibition. But it is at least clear that he looked to the prohibition and not to the concessive part of the deed as embodying the substance of the grant, and in *Walton v. Bateman*, Cresswell, J., in charging a jury and stating for their information what were "the patent grants," read the actual words of prohibition from the patent itself (c), as did Fry, J., in *Sykes v. Howarth* (d).

But whether it has been assumed that these are words of grant or not, it has always been a pure assumption so far as appears from the reports. Even in *Caldwell v. Van Vlissingen*, where the disparity between the two clauses formed the subject-matter of argument, it does not seem that the effect of these words "give and grant" was at all investigated (e).

Materials  
for the dis-  
cussion.

Such being the state of the authorities it may be useful to submit materials for the discussion of this question. Dealing first with the view that these are words of grant it is not necessary to elaborate the argument. The formula, so far as it goes, is familiar, although it is defective from this point of view for want of an habendum clause (f), for it is the habendum which renders the grant full and absolute (g). Probably in spite of this it would as against the grantor be held to be an effectual grant. Indeed there is express authority for this proposition, for it is laid down in the *Case of Alton Woods* that "the Queen's recital doth declare her intent and meaning which is

(z) 5 Nev. & M. 651. See also *Elmslie v. Boursier*, L. R. 9 Eq. 222; *Caldwell v. Van Vlissingen*, 9 Hare, 415.

(a) Macr. Pat. Cas. 22.

(b) Statute of Monopolies, sect. 6.

(c) 1 W. P. C. 615.

(d) 12 Ch. D. 832.

(e) 9 Hare, 415.

(f) *Buckler's case*, 2 Co. Rep. 55; *Earl of Shrewsbury's case*, 9 Co. Rep. 47.

(g) *Arthur Legat's case*, 10 Co. Rep. 114.

always the best direction for the construction of her grant" (*h*). If the only questions which could arise under a patent were questions between the Crown and the patentee the point could hardly come up, or at most would have but an academical significance. It is no doubt the great strength of this position which has led parties whose interests have from time to time been adversely affected by this view to acquiesce in it without protest or argument.

Such considerations do not, however, conclude third parties, and they are entitled to scrutinise with the utmost jealousy the grant by which they are restricted in the pursuit of their trade, since all restraints of trade, whether by grant from the Crown or by contract between private persons, are presumed in law to be bad until circumstances are shown to justify them (*i*). See above, p. 26.

On the other side then it may be urged that the effect of a patent upon the rights of third parties is such that its cause cannot in the nature of things be grantable away from the Crown. It is a part of the prerogative to regulate trade according to certain fixed principles of policy and rules of law, and the restraint of trade in certain measure is incidental to this power of regulation (*k*). The power to grant patents is one branch of this restraining prerogative. The Crown cannot assign franchises out of this prerogative to favoured subjects, or delegate this royal authority in whole or in part. So much may be safely inferred from the old doctrine of the limitations upon the dispensing power (*l*). The incommunicable prerogative.

This point may be put in another way. The infringement of a patent is a tort (*m*), but the act becomes tortious only by express legislation, being in itself and at common law a perfectly innocent act. The prerogative which enables the Crown to legislate thus, and by legislating to convert an innocent act into a tort, is in its nature the highest point of the prerogative. It would be strange indeed to learn that this could in any measure or degree be alienated from the Crown, and a most unusual construction of royal grants to hold that such alienation was effected by words capable of any lesser meaning (*n*). From this point of view, therefore, it is not immaterial to inquire whether these words can convey anything else than the whole patent right itself, and whether, if they do not accomplish this purpose, there is any other which they can serve. Infringement is a tort.

(*h*) 1 Co. Rep. 50. See also below, p. 119.

(*i*) *Mitchel v. Reynolds*, 1 P. Wms. 197; *Case of the Clothiers of Ipswich*, Godb. 253. See also *Sir John Molyne's case*, 6 Co. Rep. 6.

(*k*) Com. Dig., tit. Trade (B.).

(*l*) See *The case of Penal Statutes*, 7 Co. Rep. 36; and below, App. II. p. 232.

(*m*) *Watson v. Holliday*, 20 Ch. D. 782, 784.

(*n*) Com. Dig., tit. Grant (G. 12).



Patent gives remedies as well as rights.

And, first, as to what they serve to convey. The patent is not only to the patentee the source of his patent right, but also of the remedies by which he defends that right. Thus, before the Statute of Monopolies questions of infringement were brought before the Star Chamber, and considered as contempts of the royal authority, as which when proved they were punished on the footing of misdemeanours (*o*). The criminal jurisdiction has now disappeared, but it existed at the time when these words were introduced into the patent and even if the civil remedy against infringers is not conveyed by the grant, a point very difficult to determine, the right to *sci. fa.* to repeal a later grant is certainly thence derived.

*E.g.*, patentee's right to *sci. fa.*

In theory the writ for this purpose is restricted to the Crown (*p*), and the right to use the Queen's name in a *scire facias* was not in general granted with a view to promote any private end or interest (*q*), and therefore the fiat of the Attorney-General is only given conditionally to authorize proceedings by a stranger to repeal a patent. But a prior patentee of the same grant might himself have the writ according to Coke (*r*), and this was the only case in which the subject could have it. This right the patentee clearly derives from his patent grant, and it cannot in any way be deduced from the prohibitory words. But the language now under consideration is eminently fitted to impart such a right, by reason of the ample terms employed to express the rights granted. The thing granted is "our especial licence, full power, sole privilege and authority," and a case may easily be imagined in which the superlative form of this expression would become matter of importance. For example, it might chance that the second patentee had been astute enough to procure to himself an ampler gift than the earlier patentee enjoyed (*s*). Such a case can hardly now arise in respect of patents for inventions, because the form of the patent has been settled by statute. But at the time at which these words were introduced that was not so at all, and even now the use of the statutory form is not made compulsory. The patent was formerly drawn to suit the occasion, and the grant of licence and authority might be of more or less, and in point of fact did vary within considerable limits. In these circumstances it became a matter of

See below, p. 255.

(*o*) 3 Inst. 183. Mr. Coryton, who appears to have collected some curious information respecting the Star Chamber practice, calls the offence a misdemeanour. Coryton, 262. See also XIII. Acts P. C. 88.

(*p*) *Sir Oliver Butler's case*, 2 Vent. 344; *R. v. Neilson*, 1 W. P. C. 673.

(*q*) *Re Young's Patent*, Lawson, 105.

(*r*) 4 Inst. 88. See *Brewster v. Weld*, 6 Mod. 229; *Hunt v. Coffin*, Dyer, 197b; *Penwarren v. Thomas*, Dyer, 198a.

(*s*) *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.



importance to have a patent such as could not be superseded by a later grant, and in the words now under consideration there is in effect a covenant by the Crown that the present grant is such a grant. This licence is not to be overridden by an especial licence, for it is itself an "especial licence"; the power given is not to be controlled by any rival power, for this power is "full"; the privilege granted is not to be held in common with other privileged persons, for it is a "sole privilege"; and the authority is not to pale its ineffectual fire before any superior emanation, for it is "Our authority" (*t*). These words therefore do not become ineffectual or superfluous if they are held not to embody the patent right itself (*u*). They convey in any case ancillary rights which are of capital importance for maintaining the patent rights, and are the more apt to serve this purpose by reason of the very exuberance of the language used, which would be scarcely apt if the object were to create the patent right itself, and not a rampart about it.

A warranty against superseding grants.

There is yet another indispensable function which these words discharge. It has been already pointed out in commentary upon the words "especial grace" that these import that the grant is to be construed *according to the intention of the grantor* (*x*). If therefore the grant itself should present any difficulty with respect to its construction, there will be required some authentic expression of the intention of the Crown by the light of which to expound the grant. Now if the words of prohibition be taken to express the substance of the grant, then these words of concession will naturally fall into the position of an expression of the intention of the grantor. This is pretty clearly indicated by the sequence of the sentences in the patent itself, which may be abridged as follows:—"Know ye therefore that we . . . do by these presents give and grant unto the said patentee . . . full power, sole privilege, and authority that the said patentee . . . may . . . make, use, exercise, and vend the said invention . . . and to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention \* we do strictly command . . . all our subjects . . . that they do not . . . make use of or put in practice the said invention."

A criterion by which to construe the patent.

The patent exhibited in logical form

(*t*) See the Patent to Print Bibles in *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689; 1 W. P. C. 15 n. (*h*), which reserved the right to make a further grant subsequently exercised in favour of the king's printer.

(*u*) There is apparently no in-

superable legal objection to treating them as mere surplusage if the effect of the patent as a whole requires this construction. See Year Book, 9 Hen. 7, fo. 2, and *Leicester v. Heydon*, Plowd. 397.

(*x*) See above, p. 114.

The patent analyzed.

In this connection it is evident that the first clause states the end to be attained, and the second the means by which that end is compassed, the first the *intention*, the second the *action* of the Crown; and this relation, which is clearly enough traceable in the present form of patent grant, was expressed in the terms of the grant formerly in use, even so lately as the form prescribed by the Patents Act of 1852 (z).

This form may be abridged in the same terms as the existing form as far as to the asterisk, but at that point adds "according to our gracious intention hereinbefore declared." Here, then, the earlier clause is expressly identified as a declaration of *intention*, and although it of course does not follow that it is nothing more, this reference affords the highest possible authority for saying that it certainly is that.

A case in point.

So much may suffice upon the matter of form but it is interesting to inquire whether, considered in the light of a declaration of intention, it is capable in point of substance of serving any useful purpose. An illustration from the law reports comes very aptly forward at this point. The meaning of the expression "make use of" in the prohibition of the patent has been very much discussed and particularly in connection with the question whether sale of a patented article is an infringement of the patent right. In *Walton v. Lavater*, Keating, J., said that "the selling of the article and the converting it into money is about the most effectual mode of using it that can be imagined" (a). In *Minter v. Williams* on the other hand, Coleridge, J., observed that the words "make, use, exercise and 'vend'" are rather different for an obvious purpose from those of the prohibiting part "make, use, and put in practice" (b). Clearly then the word "use" presents a difficulty, for both these judgments are subsisting authorities on the construction of the prohibition, but it is manifestly impossible for them to stand together. In such a case it would under the rule in the case of *The Queen's Pardon to J. S.* (c) be the proper course to recur to the declaration of the grantor's intention, and if that sets out a purpose to confer a privilege in respect of vending it will decide the moot point in favour of the patentee.

"Give and grant." Re-capitulation.

Summarized, the argument stands thus. Conflicting decisions have left the true construction and effect of these words doubtful upon the authorities. Upon principle it may be argued that they grant the patent right because they apparently convey something,

(z) 15 & 16 Vict. c. 83, Sch.

(a) 8 C. B. N. S. 188.

(b) 5 Nev. & M. 651.

(c) Cited in *The case of Alton Woods*, 1 Co. Rep. 50. See also *Auditor King's case* above, p. 114.

and are such words as would certainly estop the Crown as grantor from denying that such a right as they express had been granted. *Contrâ*, that a mere grant to one person cannot suffice to make tortious the innocent act of a stranger, and therefore that the privilege conferred by a patent cannot be founded in a grant alone, but requires a legislative act on the part of the Crown by which the intrinsically innocent act may be rendered *malum prohibitum*, and that the true construction of these words of concession is that they convey to the patentee a right of action in corroboration of his patent right and declare the intention of the Crown, in conformity with which the prohibition laid upon the subject is to be interpreted.

### our especial licence, full power, sole privilege and authority

It has been already pointed out that the superlative form of these words is necessary to make the patentee secure against subsequent patentees (*d*).

Taken individually the powers conferred have not now any particular importance and their significance is in the main a matter of history. But read in the light of history the clause appears to be well considered and its terms fitly chosen. Thus *especial licence* points to power to do things prohibited by law. For example, in the days of James I. it was not lawful for a subject to dig saltpetre, the entire provision of gunpowder being for public reasons left in the hands of the king. But the king might license the prohibited act to any of his subjects if he thought fit. And so with many other things. It was on this principle that Elizabeth had affected to grant to Darcy an exclusive licence for the manufacture of playing cards, which licence was the subject of litigation in the celebrated *Case of Monopolies* (*e*).

Especial  
licence to  
dispense with  
laws.

*Full power* on the other hand points to the doing of things lawful in themselves but in respect of which the individual lay under some disability. Such for example were most handicrafts in the time of James. The theory of guilds and crafts was very fully developed in practice in those days, and the various fellowships were jealous of their exclusive rights and swift to repress any encroachment by unprivileged persons, and to prevent access to their ranks by any other door than that of regular apprenticeship. This opposition must have been a very formidable obstacle indeed to the working of new inventions by unchartered persons, and it was no doubt with that in view that the mediæval draughtsman introduced into

Full power  
to remove  
disability.

(*d*) See above, p. 118.      (*e*) 11 Co. R. 88 ; App. II. below, p. 231.

the patent a grant of full power to carry on the projected industry, all chartered crafts notwithstanding. This point comes out very clearly in the old form of patent, which purported to give "full power and authority . . . any law, statute, Act of Parliament, proclamation, *restraint* . . . to the contrary notwithstanding" (*f*).

And the fact that patents operated in this way in Stuart times can be established as a matter of history. Thus there is preserved in the library of the Corporation of London a complaint by the Stationers' Company of the patent granted to Roger Woodde for printing on parchment, the gravamen of which complaint was that the patent enabled the patentee to set at naught the Company's charter and encroach upon its privileges (*g*).

Sole privilege  
and authority.

*Sole privilege and authority.*—The idea of a chartered craft is still predominant in this phrase, but it is no longer present to the writer's mind as an obstacle to be surmounted; it is now a model to be copied. Accordingly the patentee is, so to speak, incorporated and erected into a new mystery; he becomes in his own person the head of a new craft which is to comprise himself, his agents and licensees and no others. From this point of view it is evident that the reference to agents is not mere surplusage as is the reference to licensees. The word licensees is of modern introduction and serves no useful purpose, for it has been necessary to find a broader basis for the rights of licensees than this saving clause in the patent (*h*).

But as against the chartered crafts it was originally as necessary to relieve the patentee's "agents, deputies and servants" from personal liability to follow the privileged craft as the patentee himself. Hence the older and more correct form was as here quoted.

Privilege.

It is a little curious that the word *privilege* should be of comparatively modern interpolation here. Probably it was introduced to indicate the intention of the Crown in modern grants to create patents of *privilege* and not patents of *monopoly*, a distinction which according to Webster serves to discriminate the power of exclusive sale (monopoly) from the power of exclusive manufacture and the like (privilege) (*i*). If so, the word, though of subtle significance, is important. To a modern reader it is curiously suggestive of the analogy of a chartered craft.

If this construction of these words be correct, it is poor advocacy

(*f*) See the Smalt Patent, 1 W. P. C. 10; and below, App. IV. p. 251.

(*g*) Rememb. 101.

(*h*) *Thomas v. Hunt*, 17 C. B. N. S. 183; *Betts v. Wilmott*, 6 Ch. 245; and see below, pp. 128, 131, and the cases there cited.

(*i*) 1 W. P. C. 5 n.



to rest the patent right upon the grant so made, which means no more than the subsisting charter to one of the livery companies of the City of London—to take as well understood an instance by way of illustration (*k*).

that the said patentee by himself, his agents or licensees, and no others, may at all times hereafter during the term of years herein mentioned

The word “*licensees*” is, as above mentioned, of recent introduction. It appears for the first time, so far as I am aware, in the form of patent prescribed by the Act of 1883, although licensees no doubt pointed at by the words “such others as he . . . shall at any time agree with” in the patent form of 1852 (*l*).

Saving of licensees.

It is not particularly apt, however, for whereas it cannot, like the older words, “*deputies, servants or agents,*” be explained by the analogy of a trade guild, it is not on the other hand self-explanatory. Thus it has been found necessary to hold that a patented article once licensed by the patentee should be free of royalty or other incumbrance in the hands of subsequent purchasers, and accordingly the doctrine in *Thomas v. Hunt* (*m*) was invented that a licence to A. to manufacture a patented article is an authority to his vendees to sell it without the consent of the patentee. The expression “*and no others*” in this place has thus failed of effect.

make, use, exercise and vend the said invention

These words have been very much criticised. It has been pointed out that they appear to extend beyond the privilege of sole working and making of a manufacture, which is all that the Crown has power to grant (*n*); and more than one modern writer has repeated the observation as if it imported some serious flaw in the instrument. The answer to all such criticisms is supplied by the observation of Lord Eldon in *The Universities of Oxford and Cambridge v. Richardson* (*o*), “that no objection as to the generality of the terms has been held to affect those powers which the king may lawfully grant.”

Generality does not avoid the grant.

In accordance with this view, Maule, J., said in *Holmes v. L. & N. W. Rail. Co.* (*n*): “You must restrain the sense of those words

To be construed according to law.

(*k*) See the Charter to the Drapers’ Company in App. IV. p. 255.

(*l*) 15 & 16 Vict. c. 83, Sch.

(*m*) 17 C. B. N. S. 183; see also *Betts v. Wilnott*, 6 Ch. 239; and

below, p. 131.

(*n*) *Holmes v. L. & N. W. Ry. Co.*, Macr. Pat. Cas. 22.

(*o*) 6 Ves. 703.



‘make, use, exercise and vend’ in the patent to such a user as amounts to an infringement of the prohibition as to working and making.”

These words have, since the year 1852 (*q*), been inserted by authority of Act of Parliament in the patent, and therefore are now quite beyond cavil. Their criticism is not however on that account unmeaning, for they had been used for upwards of two hundred years before that time, and were adopted by the Legislature with what was doubtless understood to be a fixed and defined meaning. They do not therefore override the Statute of Monopolies even by virtue of later Patent Acts, but are controlled by it and must be construed accordingly.

The words  
apply to a  
fettered trade.

The criticism which has, up to the present time, been bestowed upon them has proceeded upon the assumption that they are to be applied only to the case in which but for the patent grant in question trade would be perfectly free in substance, the actual case which presents itself in practice at the present day. So considered they are no doubt open to all the remark which has been made upon them, but as has been already pointed out above (*r*) this is a very incomplete view of the situation and puts out of sight what was probably in many cases the most important object of the grant, namely, to oust the privilege and jurisdiction of the chartered craftsmen. Bearing this in mind the reader perceives that there is here no redundant or ineffective word.

Make use and  
exercise.

The words “*make use and exercise*.” “Make” is the very word employed in the saving clause (6) of the Statute of Monopolies, and “exercise” is an irreproachable synonym of the word “working” which also is to be found in that place. The word “use” cannot be vindicated by the same simple process but it has a fitness that makes it indispensable in this place due to the fact that the charters from which the Incorporated Crafts deduced their privileges commonly employed this word to express the privileged pursuit of the craft. The charter to the Drapers’ Company of London may be cited as an illustration, where the king (Edward III.) says: “We, willing . . . that none shall use the mystery of drapery in the city of London . . . unless he has been apprenticed” (*s*). Now, complaint by one of these guilds of the patentee’s encroachment upon their mystery would naturally take the form of a complaint that he “used” it; the complaint would be so worded in order to bring it within the protection of the charter and in that case it would be a great convenience to the patentee not to have to argue whether “working

(*q*) See 15 & 16 Vict. c. 83.

(*s*) 1 Herbert, 480.

(*r*) See above, p. 121.

an invention" was "using a mystery" or not, but to be able to fall back upon his own grant and show that, user or no user, he was within his rights because he was within the very words of his patent and the patent was an answer to the charter.

The word "vend" is justifiable upon similar reasoning, for the power to sell particular goods was necessarily one of the privileges of a trading guild and constantly conceded in their charters (*t*). Vend.

within our United Kingdom of Great Britain and Ireland  
and Isle of Man

The cases of *Elmslie v. Boursier* (*u*), and *Von Heydon v. Neustadt* (*x*), by which the territorial limit has for many purposes been abolished, are noted and discussed below (*y*).

in such manner as to him or them shall seem meet

These words, which are now quite pointless, were probably originally introduced in order to make clear the perfect independence of the patentee of all rules of craft and his right to conduct his industrial and business operations in his own way and in despite of the bye-laws of any chartered fellowship (*z*).

and that the said patentee shall have and enjoy the whole  
profit and advantage from time to time accruing by  
reason of the said invention during the term of fourteen  
years from the date hereunder written of these presents

These words complete the clause which has been called the granting part of the patent. The phrase is perhaps not very apt and it is almost certainly misleading, but there can be no harm in borrowing it for present use in the sense already defined, that is to say, as expressing what as between the Crown and the patentee may be taken to be the scope of the grant. Even so this last phrase must be read with a limitation, and the well-known rule that general words following specific words are to be read in a limited sense and applied only to matters *ejusdem generis* supplies the limitation. For it is obvious that not the whole advantage of the invention of which the greater part, *i. e.*, speaking generally, the consumer's benefit, is to be for the good of the public but the whole profit and advantage accruing to the craftsman, such as the

(*t*) See the Fishmongers' Charter,  
App. IV. p. 255.

(*u*) 9 Eq. 222.

(*x*) 14 Ch. D. 233.

(*y*) See p. 126.

(*z*) See King James I.'s Charter  
to Drapers' Company in App. IV.  
p. 252.

"Whole  
profit and  
advantage."  
See above,  
p. 108.

profit upon vending or the advantage of exercising it, is here granted. It was more accurately expressed in the gold wire patent of 1618 as "the sole benefit to be raised by the sole making and selling" (c).

and to the end that the said patentee may have and enjoy  
the sole use and exercise and the full benefit of the said  
invention

See App. IV.  
p. 253.

These words, although they do not seem to have ever been judicially commented upon, are manifestly of the very highest importance in the interpretation of the grant. They show that what follows is intended to provide machinery for giving effect to what has gone before, and they imply what was formerly expressed by the reference, now omitted, to "our . . . intention" that the preceding words are in a sense descriptive, and if operative are operative only between grantor and grantee, but that what follows is to be taken note of by all the king's subjects, it is to operate in furtherance of the grant, and it is to afford a measure of the duty of third parties towards the patentee. This view has not indeed prevailed in the Courts where it has been held that the public are bound by what precedes to a larger duty than is prescribed to them by what follows (d). But the learned judge who laid down that somewhat startling doctrine does not appear from his judgment to have paid any attention to this co-ordinating clause. It is not easy to suppose that if he had observed it he would have left to his reader the difficult task of reconciling it with his decision.

The doctrine  
in *Caldwell v.*  
*Van Vlissingen*.

we do by these presents, for us, our heirs and successors,  
strictly command all our subjects whatsoever within our  
United Kingdom of Great Britain and Ireland and the  
Isle of Man

Persons and  
places out of  
the jurisdiction.  
See above,  
p. 33.

These words have been indefinitely extended by the construction put upon them by the Courts, so that they are now held to include foreigners as well as subjects (d), and not to have the effect of preventing the Courts from holding acts done abroad to be infringements (e).

Doctrine in  
*Van Heyden*  
*v. Neustadt*.

The extension of the doctrine of infringement to acts done beyond the territorial limits was very carefully considered in *Van Heyden v. Neustadt* (e), and the law as there laid down must be accepted as

(c) 41 Arch. 251.

(d) *Caldwell v. Van Vlissingen*, 9 Hare, 426.

(e) *Elmslie v. Boursier*, 9 Eq. 222; *Van Heyden v. Neustadt*, 14 Ch. D. 233.

for the present definitely settled. It may be interesting to point out therefore that the manufacturers abroad of goods of foreign manufacture enjoy under it an unlimited opportunity of obtaining oppressive patents if minded so to do. The makers of Havannah cigars, for instance, must be familiar with many trifling details of the manufacture commonly known in Cuba but quite unpublished in this country. The first of them to take a patent in this country for any such manufacturing detail, notwithstanding the fact that there is not and cannot be any manufacture of Havannah cigars within the realm, will be entitled during the existence of his patent to the exclusive trade in Havannah cigars. The common knowledge and public user in Havannah before his date will not prevail against his grant. The same thing might be said of South African gold which is in large proportion produced by a process actually patented in this country. And there must be numberless other cases of the like kind, of which probably some one or another will sooner or later demonstrate the wisdom of imposing a territorial limit upon the patent grant.

that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention or any part of the same, nor in anywise imitate the same, nor make or cause to be made any addition thereto or subtraction therefrom whereby to pretend themselves the inventors thereof without the consent, licence or agreement of the said patentee in writing under his hand and seal. . . . (But nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted)(f)

Inhibition.  
See below,  
p. 254.

“Putting in practice” is evidently in the mind of the Crown something different from user, and it would seem that it is no answer to a charge of *putting in practice* the invention to prove that what is complained of was done not in the ordinary course of the defendant’s business, but exceptionally and upon a particular occasion to meet the exigency of particular circumstances (g). This distinction was drawn by Fry, J., in the case cited in the note without reported reference to the technical meaning of the word “use” in charters above referred to (h), but it will be observed that it corresponds accurately with that technical sense of the word.

Infringement  
by exceptional  
user;

(f) See below, p. 131.

832.

(g) *Sykes v. Howarth*, 12 Ch. D.

(h) See above, p. 124.



by colourable  
imitation.

In the case of *Walton's Patent*, granted on the 27th March, 1834, the corresponding words of the grant were "that no person shall at any time during the continuance of the term of fourteen years hereby granted either directly or indirectly make, use or put in practice the invention or any part of the same nor in anywise counterfeit, imitate or resemble the same, nor shall make or cause to be made any addition thereto or subtraction from the same whereby to pretend himself or themselves the inventor or inventors, deviser or devisers thereof without the licence, consent or agreement of the said James Walton." Cresswell, J., in citing these words and explaining them to a jury, abstained from commenting in any way upon the manifest inaptitude of the phrase "whereby to pretend himself . . . the inventor," &c. (*i*). The doctrine of infringement by colourable imitation does not however rest upon this obscure passage in the grant but upon the broader ground that to permit an infringer to accomplish by an evasion the substance of what he is forbidden to do openly would be to condone a "fraud upon the patent" (*k*).

Written  
licence.  
See below,  
p. 131.

The condition that every licence to use shall be under hand and seal has been found quite impracticable. A parol licence was held an effective licence in *Crossley v. Dixon* (*l*). Implied licences have been recognized in many cases as arising out of the conduct of parties (*m*).

But a licence, to be registrable under sect. 23 of the Patents Act of 1883, must it would seem be executed in the form required by the patent. But in connection with this clause the clause printed in italics above and taken from the latter part of the patent must be read (*n*), and if any serious difficulty were to arise through the informality of licences as recognized by the Courts this saving clause would probably be relied upon as affording a way of escape. It is said that a licence though under seal need not be delivered (*o*).

on pain of incurring such penalties as may be justly  
inflicted on such offenders for their contempt of this our  
Royal Command

Pains and  
penalties of  
contempt.

This, in the time of the Star Chamber jurisdiction, was much

(*i*) *Walton v. Bateman*, 1 W. P. C. 616.

(*k*) *Hill v. Thompson*, 1 W. P. C. 242.

(*l*) 10 H. L. Cas. 308; 9 Jur. N. S. 607.

(*m*) *Betts v. Wilmott*, 6 Ch. 239; *Thomas v. Hunt*, 17 C. B. N. S. 183.

(*n*) See commentary on this clause below, p. 131.

(*o*) *Chanter v. Johnson*, 14 M. & W. 411.



the most formidable sanction by which a patent grant was maintained (*p*). The clause is now without significance.

and of being answerable to the patentee according to law for his damages thereby occasioned

The Courts have by no means attended to this clause in awarding damages, but have given them on general principles in all cases in which the grant has been held to be infringed. Thus the old practice was to give nominal damages only, and the new practice is to give damages or an account of the infringer's profits at the option of the patentee. In neither case does the Court look at the grant to see what the patentee is entitled to (*q*).

Damages defined.

provided that these our letters patent are on this condition, that if at any time during the said term it be made to appear to us, our heirs or successors or any six or more of our Privy Council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof within our United Kingdom of Great Britain and Ireland and Isle of Man, or that the said patentee is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith determine and be void to all intents and purposes notwithstanding anything hereinbefore contained

There is no modern instance of the cancelling of a patent by the Privy Council, but there seems no reason to doubt that the Privy Council could so do in a proper case, and it would be easy to find precedents. Thus in 1621 the Gold and Silver Thread Patent was called in by the king, acting apparently on the advice of the Privy Council (*r*). In 1614 the Charter granted to the cooks of London was suspended by order of the Privy Council and ordered to remain in the Council chest while the Attorney-General took steps for its legal repeal. This last proceeding was taken upon the report of Sir Edward Coke to whom the examination of the charter had been referred and who certified against it (*s*). The subject is now of no

Defeasance.

“prejudicial or inconvenient.”

(*p*) See the debate in the Commons on Monopolies, on the 20th Nov. 1601; D'Ewes, 644; 1 Parl. Hist. 924; see also D'Ewes, 652.

(*q*) *Watson v. Holliday*, 20 Ch. D. 782.

(*r*) Rememb. 223.

(*s*) Rememb. 98.

Defeasance. practical interest, but it seems to be reasonably certain that in earlier times proceedings before the Privy Council afforded an effective mode of cancelling a mischievous patent, and there is no reason in principle why this condition should not now be enforced against a patentee if need were. Queen Elizabeth recalled many of her patents apparently in this way (*t*).

The authorities as to what amounts to prejudice or inconvenience to the public are very meagre, but it would seem from the judgment of Lord Eldon in the case of the *Universities of Oxford and Cambridge v. Richardson* (*u*) that a valid grant may be rendered noxious in this way by the conduct of the patentee if he abuses his privilege. "If," said the Chancellor in that case, "an unreasonable price should be put upon the patented books the patents themselves would be put in considerable hazard."

Provided also that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any matter relating thereto at the time or times and in manner for the time being by law provided, and also if the said patentee shall not supply or cause to be supplied for our service all such articles of the said invention as may be required by the officers or commissioners administering any department of our service in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided, then and in any other of the said cases these our letters patent and all privileges and advantages whatever hereby granted shall determine and become void notwithstanding anything hereinbefore contained

Formerly a rent was reserved in the patent. This is now replaced by statutable renewal fees.

See below,  
p. 257.

This and the preceding proviso should not perhaps be regarded merely in the light of defeasances. They are more, for they are intimations to the patentee, of which it behoves him to take heed, of the duties which he owes to the public in respect of his grant, and from this point of view the vagueness of the language used is no defect.

(*t*) D'Ewes, 652; see also the account of Matthey's patent in *Darey v. Allin, Noy*, 183, and below, p. 220.  
(*u*) 6 Ves. 712.

Provided also that nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted

See in connection with this clause the commentary upon the Licence. clause which provides that a licence must be in writing and under seal (*x*). See above, p. 128.

A licence may be granted—in the vague sense of given—

by an agreement in writing not under seal acted upon by the parties (*y*);

by the act of a licensee who is empowered to assign the licence (*z*);

by parol (*a*);

by an unregistered deed (*b*);

by the sale of a patented article (*c*); but such a licence may be limited to a particular country (*d*);

by an executory agreement for a licence (*e*);

by an unstamped writing (*f*).

and lastly, we do by these presents for us, our heirs and successors, grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee.

This clause in its present form is apparently mere surplusage, for it is settled law that a patent is to be interpreted like other written documents fairly between the parties and without bias towards a harsh construction or straining after a benignant one (*g*). But in its present form it is a vestige of a proviso which formerly ran in these terms. “And lastly, we do by these presents for us, our heirs and successors, grant unto to the said J. G., his executors, administrators, and assigns, that these our letters patent shall be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of the said J. G., his executors, administrators, and assigns, as well in all our Courts of Record as elsewhere, and by all and singular the officers and ministers what- Grant of favourable construction.

(*x*) Above, p. 125.

(*y*) *Chanter v. Dewhurst*, 12 M. & W. 823.

(*z*) *Bower v. Hodges*, 22 L. J. C. P. 198.

(*a*) *Crossley v. Dixon*, 10 H. L. Cas. 308.

(*b*) *Hassall v. Wright*, 40 L. J. Ch. 146.

(*c*) *Betts v. Wilmott*, 6 Ch. 239.

(*d*) *Soc. Anon. v. Tilghman's Pat. &c. Co.*, 25 Ch. D. 11.

(*e*) *Postcard Autom. Supply Co. v. Samuel*, 6 R. P. C. 562.

(*f*) *Chanter v. Johnson*, 14 M. & W. 408.

(*g*) *Neilson v. Harford*, 1 W. P. C. 341; see above, p. 115.

soever of us, our heirs and successors, in that part of our said United Kingdom of Great Britain and Ireland called England, our Dominion of Wales, and town of Berwick-upon-Tweed, . . . and amongst all and every the subjects of us, our heirs and successors, whatsoever and wheresoever, notwithstanding the not, full, and certain describing the nature or quality of the said invention, or of the materials thereunto conducing and belonging." The point of this saving was that as the nature of the invention was only very incompletely represented in the patent after the passing of the Act (*h*) which provided for the enrolment of specifications, being indeed only expressed by the title of the invention, questions might arise as to how much was covered by the grant. The proviso was intended to secure the patentee against any attempt to cut down his rights by pressing the necessarily elastic language of the title to his disadvantage. The proviso has now disappeared, but the patentee's rights stand upon the more assured foundation of a rule of law. The changes introduced in modern times into the phraseology of the grant have given additional force to the comment extorted from Parke, B., fifty years ago that "it is difficult to give effect to all the words of a patent" (*i*).

### In witness, &c.

The seal.  
See above,  
p. 27.

The deed is now sealed with the seal of the Patent Office, which gives it the same validity as if sealed with the great seal of the United Kingdom (*k*).

(*h*) 15 & 16 Vict. c. 83, s. 6, and  
see Sch. form of patent.

W. 826.

(*i*) *Chanter v. Dewhurst*, 12 M. &

(*k*) Patent Act, 1883 (46 & 47  
Vict. c. 57, s. 12 (2)).

## CHAPTER VI.

## PROCEDURE.

IN considering the question of proceeding in an action under these various enactments, the first point which presents itself must be what relief can be obtained. The two forms of relief in which a plaintiff is interested are damages and an injunction, and the point comes therefore to this:—What can be recovered by way of damages, and in what circumstances can an injunction be granted?

Relief obtainable.

With regard to damages only it will probably be found that in most cases the Statute of Monopolies gives the ampler remedy (*a*). But this statute makes no express provision for an injunction to issue. This circumstance would not however, at the present time, be held to preclude the Court from granting an injunction in aid of the right conferred by the statute (*b*), and there would seem to be no difficulty about concluding that in a proper case the granting of the injunction would be considered to be “just and convenient” within the meaning of the Judicature Act of 1873 (*c*). For upon the principle laid down in the Court of Appeal in the case of *The N. L. Railway v. The G. N. Railway* there is here clearly a legal right capable of being enforced at law independently of the Judicature Act, and that being so, whatever may have been the previous practice, the High Court may now interfere by injunction in protection of that right (*d*).

Injunction in aid of remedy given by the Statute of Monopolies. See above, p. 18.

(*a*) See above, pp. 39 *et seq.*

(*b*) *Cooper v. Whittingham*, 15 Ch. D. 507; *Hayward v. E. Lond. Waterworks Co.*, 28 C. D. 147.

(*c*) Jud. Act, 1873, sect. 25, subsect. 8.

(*d*) 11 Q. B. D. 40.



Even apart from the Judicature Act it would seem that the Court of Chancery would have interfered in the same way in support of this right, for Lord Eldon has laid it down in *Cadell v. Robertson*, where the question was whether an injunction could issue in support of the statutable copyright given by 8 Anne, c. 18, that if a civil remedy is given by statute the party will be entitled to all the benefits known in the common law for the protection of that right in addition to those in the statute (e), and, accordingly, an injunction was granted although not expressly provided for by the Act.

Dicta to the contrary considered.

It seems then that an injunction can be asked for as well as damages under the Statute of Monopolies, but some appearance of authority for the contrary view may perhaps be drawn from the language of certain recent judgments, such for example as *Colley v. Hart* (f), where, referring to a threat of legal proceedings under a patent which it was admitted could not be sustained, Mr. Justice North said, "There is no evidence before me at present that that was published maliciously, and therefore there is no right of action whatever in respect of it unless it is given by the thirty-second section of the Patents Act" (g).

But this and other dicta to the same effect which may be found in the reports must all be read with a reservation of the rights conferred by the Statute of Monopolies which has never on these occasions been brought to the attention of the judges.

No special damage. Sect. 4 and sect. 32 compared. See above, p. 18.

In most cases then in which actual damage can be shown it will probably be found that the Statute of Monopolies affords the plaintiff a better remedy than the Patents Act. But a case arises sometimes in which no actual damage can be shown, but the apprehended damage, if threats continue, is sufficiently serious to prompt the aggrieved party to seek his legal remedy. This case arose

(e) 5 Paton, Sc. Ap. 503.

(f) 7 R. P. C. 106.

(g) See also *Day v. Foster*, 7 R. P. C. 58; *Skinner v. Perry*, 10 R. P. C. 5.

in *The Driffield and East Riding, &c. Co. v. Waterloo, &c. Co.*, and it was decided that the notion of damages did not enter into the cause of action in that instance (*h*), and the same conclusion may be drawn from the language of Lord Justice Smith in *Skinner v. Shew* that the section imposes an absolute prohibition against a person's threatening unless the threatener can get himself within either of the two saving clauses at the end of the section (*i*).

Another case must be considered in which the criterion is not special damage but the position of the parties relatively to one another. Thus a patentee may issue threats against his licensee, and in a case in which a dispute has arisen as to the existence of a licence this is very likely to happen (*k*). It does not seem that the Statute of Monopolies would give any remedy in this case, because by the admission of both parties the grant here in question falls within the exception created by the sixth section. But under the thirty-second section of the Patents Act the grievance is proved if the plaintiff establishes non-infringement (*l*). He may therefore under this section prove his right under the licence to do what is forbidden by the patent, and thereupon recover damages in a case not covered perhaps by the Statute of Monopolies.

Threats  
damaging to  
a licensee.

There being this disparity between the two remedies the question naturally arises—Can they be combined in one and the same action? The question is not free from difficulty. It would indeed appear at the first blush that the two causes of action are perfectly fit to be joined. The facts are the same, if actual damage has arisen out of the acts complained of, and the only ground upon which they can be distinguished at all is that the right to sue is given in one case by one statute, in the other case by another. So far therefore there is no inconvenience to be apprehended from the joinder of the two causes of action, and

Joinder in  
one action.

(*h*) 3 R. P. C. 48.

(*i*) (1893) 1 Ch. 426.

(*k*) See *Barrett v. Day*, 43 Ch. D. 444.

444.

(*l*) See Patents Act, 1883, sect.

32.

Joinder in  
one action.

See above,  
p. 92.

as the power to join given by the Rules of the Supreme Court to a plaintiff are very large (*m*), it may be presumed that the joinder is always permissible, unless it can be shown in some way to prejudice the fair trial of the action. It is perhaps open to doubt whether or no such prejudice can arise to the defendant from the joinder. Thus a practice has arisen, not founded in any positive law, but eminently convenient of applying to a threats action in which the validity of a patent is brought into discussion the same system of pleading and procedure which applies in an action for infringement or revocation. It commenced with *Kurtz v. Spence*, in which the Court of Appeal in granting leave to amend by way of raising the question of validity annexed to that indulgence the condition that the defendants should have the same notice of objections and the same right to begin and to reply that they would have had if they had been plaintiffs bringing an action for infringement (*n*).

It was followed in *Crampton v. Patents Investment Co., Ltd.*, in which an order was made for particulars of infringement, and the case was apparently opened by defendant's counsel (*n*). Can the same practice be followed in the case of an action founded on the Statute of Monopolies? This, considered as a general proposition, seems very doubtful (*o*). About the delivery of particulars there need be no difficulty, but about the right to begin and reply difficult questions would probably arise. In the case of a threats action the facts as to the threats are not generally in dispute, and, what is even more to the point, in the cases which have been above cited as in a sense establishing the practice of permitting the patentee to begin at the trial (*n*), the facts as to the threats were expressly admitted by the defence, and issue was taken

(*m*) R. S. C., Ord. XVIII. r. 1.

(*n*) *Kurtz v. Spence*, 36 Ch. D.  
774, 776; *Crampton v. Patents In-*

*vestment Co., Limited*, 5 R. P. C.  
391. See above, p. 92.

(*o*) See below, p. 138.

upon infringement, and although the question of damages was still outstanding, and raised an issue which the plaintiff must support, that alone does not give him the right to begin (*p*).

See below,  
p. 145.

There does not seem to be any reason why the same practice should not be followed in an action founded on the Statute of Monopolies. It is no doubt true that special damage must be proved in this case, but that, as has been shown in the last preceding paragraph, does not determine the right to begin. In other respects the pleadings might apparently be shaped exactly as in a threats action, and the right to begin be thus secured to the defendant. Even if that be not so, it is not evident that the two causes could not be tried together, for the case would in that event not fall within the principle of *Warter v. Warter* (*q*).

In the case cited the difficulty was that one proceeding would commence by a petition, the other by a writ, involving disparity of procedure at every stage of the proceedings so that more inconvenience than advantage would in all probability result from the formal joinder. No such difficulty arises in the present case. The issues in both the supposed actions would be raised by substantially the same pleadings, both might go into the same cause list, both would involve the same evidence, and if the positions of the parties should be reversed upon the two proceedings, that is no more than happens in every instance in which, out of one and the same transaction, both claim and counterclaim arise. This last affords perhaps the closest analogy that can be adduced from existing practice to the case under consideration. The right to have the validity of the patent and the fact of infringement established in the action by a binding decision *inter partes* is itself a right to a substantial measure of relief, and although it does not appear that the consequential relief

*Warter v.*  
*Warter.*

(*p*) *Bedell v. Russell*, Ry. & M. 294; 26 R. R. 750.  
(*q*) 15 P. D. 36.

Joinder in  
one action.

of an injunction and damages has ever yet been asked for by way of counterclaim in such an action, there does not seem to be any technical reason why this should not be done. The course indicated in the thirty-second section of the Patents Act of a separate action would generally be so much more convenient in practice to the patentee that the cases are and probably always will be comparatively few under that statute in which the alternative of a cross action would not be preferred. But to the extent of the relief actually sought, which amounts in effect to a declaratory judgment upon the issues of validity and infringement, the defendant in a threats action who sets up his patent right is in effect a counter-claimant.

So far these considerations point to the conclusion that these two causes of action may be joined, but it is necessary to consider whether their joinder will not embarrass the defence by depriving the defendant of the advantage of that escape from the action which he enjoys under sect. 32 upon the condition of bringing an action for the infringement of his patent right. The nature of this escape has been already considered (*t*), and it is obvious that it would not be available in the case of an action founded on the Statute of Monopolies. But although he could not escape from the action in this way he might apparently set up his cross action by way of defence to the writ so far as it was founded upon the thirty-second section. If so he is not embarrassed by the joinder.

A doubt may indeed be suggested upon the language of the judgment in *Lynch v. Macdonald* (*u*), in the case of an action brought in the Chancery Division, whether the defendant might not claim to sever the causes of action in order to carry that founded on the Statute of Monopolies into the Queen's Bench Division (*x*) and have it tried by a jury. It may for this reason be wise to bring this action in that Division, but on the other hand it is clearly very

(*t*) See above, p. 94.

(*x*) But see above, p. 56.

(*u*) 37 Ch. D. 234.



desirable that two actions in both of which damages can be given for the same tort should not be independently tried.

Perhaps then it may be assumed that the plaintiff can join these two actions in one writ. What advantage will accrue to him from so doing? To this question there is an obvious answer. In the first place the threats action affords an useful supplement to the older action because it is maintainable without proof of special damage (*y*) and may therefore save the plaintiff's case if his evidence on this point should break down. But this is a comparatively small matter. What is of much greater importance is that the monopoly action cannot be defeated by an infringement action independently instituted. If the defendant in that case relies upon his patent right he must set it up by way of defence, and if there is a question of infringement to be tried it will probably be better worth his while to raise it in the same than in another proceeding. A case often arises in which the plaintiff in a threats action desires to force the defendant to bring his patent right to trial, but is unable to compel him to come to close quarters by reason of the means of evasion which the Patents Act provides. In such a case the Statute of Monopolies supplies precisely what is wanting. It will be of no advantage to the patentee to get the threats action dismissed on an undertaking to prosecute an infringement action if the monopoly action continues and his patent right must be established in that proceeding. In this way perhaps a cure may be found for the anomaly by which under the Patents Act a confessed wrong is left in certain cases without a remedy.

*The Statement of Claim.*—In pleading this cause of action it is necessary to state with precision every fact which brings the case within the Act (*z*). But the Act itself being a public general Act need not be set out (*a*), but must be judicially noticed.

Advantage  
of joinder.

The plaintiff's  
case.  
See above,  
p. 52.

(*y*) See above, p. 90.

(*z*) Odgers, Pleading (2nd ed.), 62.

(*a*) *Boyce v. Whitaker*, 1 Doug. 97.

The conditions to satisfy the fourth section of the Statute of Monopolies are the following:—

1. The date.  
See above,  
p. 39.

1. The grievance must occur “after the end of forty days next after the end of” the session of Parliament of 1624.

That session terminated on the 2nd November, 1624. But it is not now necessary to allege fulfilment of this condition, it may be taken for granted (*b*).

2. The grievance.  
See above,  
p. 39.

2. The plaintiff must have been hindered, grieved, disturbed, or disquieted, or must have endured to have his goods or chattels seized, attached, distrained, taken, carried away or detained.

These are alternative grievances. What facts amount to a grievance under these clauses is a question which has been already discussed (*c*). There is no great harm in pointing the allegation by quoting the words of the section; thus “The defendant has hindered the plaintiff by” such and such acts; but it must not be forgotten that the acts which amount to the hindrance, grievance, &c., are the material facts. It is not necessary to put a particular complexion on the facts by applying to them the descriptive words “hindrance,” “grievance,” and so forth, and being unnecessary it is perhaps faulty pleading to do so (*d*). A statement of claim would be utterly bad which, adopting the general language of the statute, should omit to allege the particular facts complained of.

3. The pre-text.  
See above,  
p. 45.

3. The acts complained of must have been performed by occasion or pretext of some monopoly, or of some commission, grant, licence, power, liberty, faculty, letters patent, proclamation, inhibition, restraint, warrant of assistance, or other matter or thing tending to the instituting, erecting, strengthening, furthering or countenancing of any mono-

(*b*) *Rex v. Kilderby*, 1 Wms. Saund. 309b, n. 5.

(*c*) See above, p. 41.

(*d*) Odgers, Pleading, ch. ij.

poly, or any commission, grant, &c., of sole buying, selling, making, working or using of anything within this realm or the dominion of Wales, or of power to dispense with any law, or to compound for statutable forfeitures, or of any grant of the benefit of a forfeiture, &c., due by statute before judgment thereupon had.

This is a bewilderingly comprehensive list of torts, but it may for present purposes be restricted to the single case of an act performed by occasion or pretext of a monopoly, or of letters patent tending to a monopoly. It will be seen from the discussion of the word monopoly above, that all patents for sole buying, selling, making or using, tend to institute monopolies, except such as fall within the sixth section of the Statute of Monopolies (*e*).

4. The action is to be grounded upon the statute, and therefore it must be pleaded in that form, that is to say, the act complained of must be alleged to be contrary to the statute.
4. The statute.  
See above, p. 96.

The language of some of the dicta in which this decision has been embodied seems to point to the doctrine that this depends upon there being a penalty in question. Thus in giving judgment in *Lee v. Clarke*, Ellenborough, L. C. J., said: "I rest on the first" (objection) "that in an action for a statute penalty by a common informer, as well as in proceedings by indictment or information, it has been invariably holden that the fact must be alleged to be done against the form of the statute" (*f*). But this is perhaps not a very precise account of the matter. A much more convincing reason is assigned by Lawrance, J., for his concurring judgment in the same case: "In the case of indictments to which this bears a close analogy, there is no question but it is so. (*Vide* 2 Hawk. P. C. c. 25, f. 116.) The reason of which is that every offence for which a party

(*e*) See above, p. 25.

(*f*) 2 East, 339.

Pleading the statute.

is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor by reference to a statute shows that he means to proceed upon it, and without such express reference, if it be no offence at common law, the Court will not look to see if it be an offence by statute" (*g*).

In that case the plaintiff was a common informer, but the rule has been extended also to the case in which an aggrieved party sues for a statutable penalty.

Indeed in *Fife v. Bousfield* it was so strictly applied that a declaration of all the other material facts followed by the words "whereby *and by force of the statute in that case made and provided*, an action hath accrued to the plaintiff" was held bad, and an objection that the offence was not charged as "*contra formam statuti*" was allowed in arrest of judgment (*h*). Probably such extreme strictness would now be held to be excessive, and the earlier doctrine that "it is necessary in some manner to show that the offence on which you proceed is an offence against the statute" (*i*) would find more favour with the Court. This reason is of especial force in a case like the present where it has been again and again said that no action lies at common law.

But it must be borne in mind in this connection that the tendency has been in recent times to relax the stringency of the rules of pleading; and in *Herrburger v. Squire* (*k*) an action pleaded as slander of title was treated as an action grounded in sect. 32 of the Patents Act, and all necessary amendments were *at the trial* directed to be made.

The Rules of the Supreme Court provide a particular mode of pleading a statute in certain cases which arise by way of defence (*l*). There is no similar rule concerning the pleading of a statute in the statement of claim and as ground of the action. The recognized formula is to state the facts complained of and conclude the statement with the words

(*g*) 2 East, 340.

(*h*) *Fife v. Bousfield*, 13 L. J. Q. B. 308.

(*i*) *Lee v. Clarke*, 2 East, 342.

(*k*) 5 R. P. C. 589.

(*l*) R. S. C., Ord. XXI. r. 19.

“contrary to the form of the statute of the 21 Jac. I. c. 3.”

But it would probably be more convenient for all concerned if this somewhat antique and not very explicit form of expression were replaced by a reference in the margin to the Act and the section of the Act relied upon, as in the case of pleading the general issue by way of defence.

5. The *amount* of the damages.

5. Damages.

The defence to this action opens up a somewhat new set of considerations. For this purpose it is not unimportant to decide whether it is or is not, within the fourth section of the Act for the ease of the subject concerning the informations upon penal statutes (*m*). The authorities upon this point have been discussed above (*n*), and as they leave the matter in some doubt, it will be assumed that, for the purpose of pleading, the Statute of Monopolies will be considered to be a penal statute. In that case therefore the defendant may plead the general issue, and give in evidence any special matter of defence which might have been specially pleaded. But will it be expedient for him so to do? In most cases probably not. Of course to plead in this way would greatly simplify the actual pleading, but it would greatly complicate the issues for the Court if it succeeded, and it can hardly be to the advantage of a patentee to have his case produced in that form. If he does not expressly set up his patent he cannot of course call upon his adversary to allege objections to it, and a patentee who should come into Court to defend his patent against objections of which he had no notice would be in a much worse plight than the attacking party, who although he might not have had notice of the defence would know perfectly well what the defence must be. He may indeed be taken by surprise as a consequence of not having received particulars of breaches, but the facts are as a rule so much better known to the infringer than to the patentee, that this is but a small risk. On the other hand, particulars of objections are indispensable to the

Defence to  
the action.

Pleading the  
general issue.  
See above,  
p. 54.

(*m*) 21 Ja. 1, c. 4.

(*n*) See above, p. 52.



conduct of the patentee's case, and if, therefore, he intends to assert his patent right at the trial it must be a matter of capital importance to him to get the pleadings conducted upon the customary lines of a patent action. The only case in which it could be conceivably an object with the patentee to keep the plaintiff in the dark as to his defence is that in which he does not intend to go upon the patent right all, but can rebut the evidence as to threats or other grievance which is made the subject of the complaint. In that case he might by silence induce his adversary to devote attention to the issue of validity which was destined never to arise and to neglect the preparation of his own case upon the facts. But such astuteness would not in these days find favour with the Courts and it would be very apt to overreach itself. The plaintiff, put upon inquiry by the singular course adopted in the conduct of the defence, would have recourse to interrogatories, and in that way would extract from the party himself the secret which his pleader had protected. The net result would be that he would have to give on oath the defence refused in the form of plea and would have incurred additional expense to no purpose. If then it be assumed that a defendant is entitled to the benefit of the general issue, it is difficult to conceive any circumstances in which that benefit would be an advantage.

Futility of  
the expedient.

Defence  
pleaded  
specially.

Assuming then that the defence will be specially pleaded, we come upon the question—In what form? This must, of course, depend upon the circumstances of the case, but some general considerations would seem to apply to what will probably prove to be the commonest case in which the grievance is a threat of legal proceedings. The first question that will present itself to the pleader's mind will be, Can I so shape the issues as to secure the right to open? And in the case of an action upon threats this will generally be possible. For in these cases there is not as a rule any serious conflict of evidence as to the threat in question. Doubts may arise as to whether a particular

Admissions.

intimation should or should not be classed as a threat, although there is probably much less room for doubt under the Statute of Monopolies than under the Patent Act. But such doubts do not affect the issues and can be properly raised and duly submitted to the Court upon admitted facts. Generally therefore there is no good reason for the defendant to deny the facts, and to damages he need not plead (o). See above,  
p. 137.

When the defendant stands in this position it is easy to mould the issues so as to give him the right to begin. The facts constituting the alleged threat will be expressly admitted, the point of law, if that be thought desirable, will be raised (p), and the substantial defence, the patent right and its infringement, will be set up. There does not seem to be any reason why relief in the form of damages, and an injunction should not be asked by way of counterclaim, and in that case a patent action would be regularly constituted. In such a case probably the Court would direct the delivery of particulars upon the analogy of a patent action under the Act of 1883, and in that way there would come about in the result what it was probably the intention of the Legislature to accomplish by the 32nd section of the Patent Act; that is to say, the patentee would threaten proceedings only at the peril of having to make good his threats if challenged so to do by the party injured by his threats. If once the issue of fact as to the matter complained of is out of the way, there is no reason why a patent action commenced by way of counterclaim should not be just as easy to conduct and to decide as a patent action commenced by writ of summons. Indeed if the practice followed by Field, J., in *Crampton v. The Patents Invest. Co. Ltd.* be correct, it would seem that a certificate that validity came in question can be given by the judge who tries the case (q). Particulars of  
breaches and  
objections.

(o) R. S. C., Ord. XXI. r. 4.

(p) R. S. C., Ord. XXV. r. 2.

(q) 5 R. P. C. 404. But see

*Kurtz v. Spence*, 5 R. P. C. 184.

But a case may arise in which the issues cannot be shaped in this way and in which the plaintiff has undoubtedly the right to begin. To try a patent action in this inverted order would unquestionably be exceedingly inconvenient. It would in certain cases be inconvenient even for the plaintiff himself, for when, as often happens in a patent action, the construction of the specification is in question, it is a very embarrassed position for a plaintiff to have to attack a construction which has not been avouched by the other side and to set it up for the mere purpose of demolishing it. It is in all cases very convenient for the Court to have the invention defined at the earliest possible stage of the proceedings and to receive that definition in an authoritative form from the party who will be responsible for supporting it. This is a view of the matter which will probably commend itself to counsel familiar with the proceedings in a patent action, and it may be expected that an arrangement will generally be arrived at that the issues of validity and infringement shall be tried in this way, without prejudice to the trial of the issues relating to the grievance. But in the last resort if no agreement can be come to recourse may be had to the Court to order the trial of these issues (*r*) separately and before the other issues in the cause. Such an order is clearly within the power given by the rules to the judge in chambers, and it is submitted that it would in the circumstances supposed be within the principles laid down for the guidance of the Court in the application of the rule. Thus in the *Emma Silver Mining Co. v. Grant*, JESSEL, M.R., made the order because the case was "one of simple issues." There were two issues in form but in reality they were one. The real issue was whether the Grants as promoters of the company pocketed 100,000*l.* or thereabouts out of the purchase-money without the knowledge of the company. It was an issue which could

Separate trial  
of the issues  
of validity and  
infringement.  
See above,  
p. 97.

Existing  
practice.

very well be tried apart from other issues which affected other defendants in the action, and as the plaintiffs were content to limit the relief sought against these defendants to such as should arise out of this issue they were allowed although originally responsible for the form of the action to have it disposed of in a separate trial (s).

In giving judgment in that case the Master of the Rolls reviewed three cases in which, at the instance of the defendant, he had made such an order. In all these cases he acted upon two main considerations, first, that there was serious reason to believe that the trial of the selected issue would put an end to the action, and second, that the trial of the remaining issues would involve great hardship in the form of expense to the defendant in a case in which it appeared probable that the expense would be thrown away. These however were adduced as illustrations only of a principle, and although the judge himself refrained from attempting to define the principle, it would undoubtedly be safe to generalize his instances to the extent of saying that hardship to one party or the other is a thing to be considered in the application of this rule, even when it does not take the shape of inordinate expense.

Even more suggestive from our present point of view is the later decision of the same judge in *Piercy v. Young* (t). In that case he refused a defendant's application for the separate trial of a particular issue and in so doing he said, "The issue which the defendant asks me to try he has chosen himself to raise in the counterclaim. He might, if he had thought fit, have brought his action for specific performance. It was entirely his election to make his claim an issue in the action. It was not the plaintiff's issue in the action, and it is not the substantial issue in the action, and as the defendant has chosen to raise this issue by his counterclaim he must be considered to have

(s) 11 Ch. D. 930.

(t) 15 Ch. D. 478.

Separating  
issues.

so acted for no other reason than because, according to the provisions of the Judicature Act and the rules thereunder, it is desirable that all questions at issue between the plaintiff and the defendant shall be tried at the same time. He has actually availed himself of those rules to get this issue tried at the same time as the plaintiff's issue and now he comes here with a motion that it shall be tried separately."

It is very clear that in the case now under consideration no similar reasoning could apply. The issues of validity and infringement could not be said, in the sense of this dictum, not to be the plaintiff's issues nor could the defendant be said to have introduced them *at his election*. If therefore hardship results to him from the raising of these issues in this way, he is not debarred by his own conduct from asking the Court to give him relief.

There are a few other reported cases which throw additional light upon this matter. Thus in *Smith v. Hargrove* (u) it was held by the Divisional Court that the question of liability had been properly divided from the question of damages. The reason of this decision would not however apply to the present case, for it was there considered that the assessment of damages would involve the investigation of intricate accounts and would therefore in all probability be, in any case, remitted to a referee.

In *Simson v. The New Brunswick Trading Co.* (x), Huddleston, B., seems to have taken a very large view of the power given by this rule, and to have justified its exercise on the vague ground that "the judge and the master thought it was more convenient to try the question of election first." It would seem, however, from the report of the argument that it was made to appear to the Court that in this case the whole action would fall if the issue were decided in the defendant's favour. So that it may be regarded as standing on much the same footing as

(u) 16 Q. B. D. 184.

(x) 5 Times Rep. 148.



the more carefully reasoned decisions of Jessel, M. R., above cited.

There are one or two other decisions to the same general effect (y), but the principle must be collected from the cases above cited, and it is submitted that it covers the instance now under discussion and that if the plaintiff will not consent to allow the defendant to open upon the issues raised by pleading the patent, it would be a proper exercise of the discretion given by the rule for the judge to direct that they should be tried first. This arrangement need not involve a second trial since the order can direct that the issues shall come into the same list as the trial but come first, or indeed the judge at the trial has power under the rule to make the order then and there (z). Probably it would be unwise for a defendant to rely on obtaining the order at the trial since he would be putting his adversary in the best possible position for resisting it. A more promising course would seem to be to apply at chambers for the order, and if the master should be indisposed to make it to ask him to refer the application to the judge at the trial. The plaintiff then could not complain of surprise.

Inference  
from the  
authorities.

The argument, on principle, in favour of this course appears indeed irresistibly strong. Not only is there the unbroken tradition in *scire facias* adopted in the Patent Act of 1883 (a), which gives the defendant the right to begin in case of proceedings for the revocation of a patent, but there is the great inconvenience to be considered to which the Court is subjected by the alternative procedure. The plaintiff and defendant in a patent action never are agreed as to the construction to be put upon the specification. The party attacking the patent argues, naturally

On principle.

(y) See *Liverpool, Brazil, &c. v. London & St. Katherine's S. N. Co.*, W. N. (1875) 203; *Tasmanian Ry. Co. v. Clark*, 27 W. R. 677.

(z) An instance of such an order is *Otto v. Steel*; *The Same v. Sterne*, 2 R. P. C. 139; see also *Barrett and Eler's v. Day*, 7 R. P. C. 57.

(a) 46 & 47 Vict. c. 57, s. 26 (7).

enough for a construction which will defeat the grant; the party maintaining the patent argues, on the contrary, for a construction which has been carefully thought out, with a view to supporting the patent. Now the assailant's construction binds nobody, it is a mere engine of argument. But the construction put forward by the patentee is binding upon him by way of an admission, and if it be a tenable construction it may be binding on the Court which, in dealing with patents, follows the rule that the specification is to be so construed as to uphold the patent, if it can reasonably be done (*b*). Now nothing can be more inconvenient for a Court, or tend more surely to the waste both of time and attention, than to have to listen to a criticism when it is not as yet in possession of the subject-matter, or to follow an argument based upon postulates which will fall as soon as the adverse party opens his case. The practice in patent actions is founded in logic, and cannot be discarded with impunity. It is not merely a rule of law, but of thought also, and to put the refutation before the thesis is to involve both statements in confusion, and the tribunal which has to consider them in what must at least be a vexatious and unnecessary toil.

Considered in  
the light of  
the Statute of  
Monopolies.

It may be suggested whether the Statute of Monopolies with its directions for the conduct of this action and its denunciations of the mysterious penalties of *præmunire* against all who presume to obstruct or divert its course, does not preclude the arrangement now proposed. To this question only the section itself can afford an answer, and the reader may therefore be referred to the chapter, in which the section is set out and discussed in detail (*c*). The result, so far as the present writer can judge, is that there is no difficulty about regulating the proceedings in the way proposed, or indeed in any way which the existing

(*b*) *Russell v. Cowley*, 1 W. P. C. 470; *Needham v. Johnson*, 1 R. P. C. 58; *Autom. Weighing Mach. Co.*

*v. Knight*, 6 R. P. C. 307. And see above, p. 115.

(*c*) See above, pp. 39 *et seq.*

practice sanctions, provided that any departure from the ordinary course of procedure receives the approval of the Court in which the cause is depending. It is indeed a curious and perhaps a notable fact that the changes of procedure which have taken place during the past two hundred and seventy years have tended to assimilate the ordinary course of law to that which is adumbrated in the section, so that it is to-day easier to conduct an action in strict accordance with the requirements as to procedure of this ancient statute than it would have been in the year in which it passed into law.

Assuming that in one or other of these ways the action can be brought into the ordinary form of a patent action, we may dismiss the subject of procedure at this point with a general reference to the many works in which the proceedings in such an action are fully discussed (*d*), for the issues being the same there is every reason for adopting in this case the rules as to particulars, interrogatories, inspection, and so forth, which have been elaborated in patent actions, and although these rules are to some extent special, it will probably be found that the Rules of the Supreme Court confer sufficient authority upon the judges to make the application of the special rules to a new case perfectly feasible.

Reference has been made in a foregoing chapter to the remedy given by the 22nd section of the Patent Act, 1883, in the form of a petition to the Board of Trade for a compulsory licence (*e*). In a case in which this remedy is given as, for example, where the defendant is working an improvement upon the patented invention it is conceived that he is entitled to set up the right to a statutable licence by way of defence to a *perpetual injunction*, for clearly if he is about to obtain a licence the Court will not grant an unconditional *perpetual injunction* but one limited either by

Statutable  
right to  
licence  
pleaded by  
way of  
defence.  
See above,  
p. 99.

(*d*) See a list of such books,  
above, p. 69.

(*e*) See above, pp. 98 *et seq.*

Effect of the  
injunction  
considered.

an express condition saving the licence or by leave to apply to set it aside when the licence is granted. Indeed, the right to a licence ousts the right to an unconditional injunction for the plaintiff, to establish his right to the injunction, must prove that the continuance of the act complained of will be necessarily unlawful; it is not enough to say it may be unlawful (*f*). Now this he clearly cannot do if the defendant is entitled to have a licence upon reasonable terms, for the licence will legitimate the act. There is perhaps another ground upon which the same inference may be rested. It may be doubted whether the Board of Trade could entertain the petition of an applicant against whom the High Court had issued an injunction. The petitioner can only succeed if he proves that he is prevented from making the best use of his own invention through the *default* of the patentee. And the Board of Trade might quite conceivably consider that there was no default in refusing to licence disobedience to the injunction of the Court. In order therefore to save the defendant's statutable rights the injunction, it is conceived, ought only to go upon the terms that the patentee will grant a licence upon reasonable terms, and that the injunction is not to interfere with the defendant's operations under the licence or application to the Board of Trade.

*Badische  
Anilin v.  
Levinstein.*  
See above,  
p. 103.

That the hardship inflicted by the perpetual injunction is often very grievous no one will doubt who has had experience of patent actions. It was very strikingly illustrated in the case of *Badische Anilin v. Levinstein* (*g*) tried in the year 1883 and just before the passing of the Patent Act, a case which could indeed easily be supposed to have given occasion for this provision of sect. 22. Pearson, J., giving judgment against the defendant in that case said: "I cannot come to this conclusion (*h*), I must honestly say, without some regret. I think Mr. Levinstein has em-

(*f*) *Pattison v. Gilford*, 18 Eq. 263.

(*g*) 24 Ch. D. 175.

(*h*) *i.e.*, to grant the perpetual injunction.

ployed great knowledge, great skill and great perseverance in finding out these processes, but I am sorry to say that the law compels me to inform him that these processes cannot be used in the production of this colouring matter seeing that the production of this colouring matter is protected by a patent."

That judgment was pronounced in June, 1883, and expounded what was at that time the undoubted law; but on the 25th August following the Royal Assent was given to the section now under discussion, and henceforward the law, far from saying that an improved process cannot be practised if it falls within a subsisting patent and that in that case the later inventor's great knowledge, great skill and great perseverance shall go for nothing, says that if by the default of the patentee to grant a licence the inventor is prevented from working or using his invention to the best advantage he shall be entitled to an order from the Board of Trade for a compulsory licence upon such terms as the Board shall deem just. It is probably not too much to say that in this altered state of the law no patentee is entitled to a perpetual injunction against an infringer who is working an improved form of the patented invention unless and until he has offered a licence upon reasonable terms. The point does not seem, however, to have come before the Courts for apparently no defendant in a patent action has yet bethought him of claiming his statutable right.

Contrasted  
with the law  
under 22nd  
section.

The following alternative defence raising this point was drafted for the purposes of a recent action but did not actually come before the Court. It is now published by way of suggestion and as embodying in a concrete form the views here advanced.

Form of plea.

In the alternative if the said patent is valid, which is not admitted, and if the plaintiff's patent right covers the defendants' manufacture, which is not admitted, then the defendants will rely upon the following matters as defence to the plaintiff's claim.

The defendants are in possession of an invention within



the meaning of sect. 22 of the Patents, Designs and Trade Marks Act, 1883. The said invention could not be worked to the best advantage in the alternative above mentioned save under licence from the plaintiff to use the plaintiff's said invention upon reasonable terms.

The defendants will in the said alternative be prepared to take and will claim to have such licence from the plaintiff, and the defendants therefore submit that the plaintiff would not be in the circumstances aforesaid entitled to the relief claimed.

This was in answer to the usual claim for a perpetual injunction and delivery up of the goods alleged to infringe.

# APPENDICES.

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## CONTENTS.

- I. KING JAMES' DECLARATION (The Book of Bounty), p. 157.
- II. REPORTS OF CASES.
  - (1) The Case of Monopolies, p. 193.
  - (2) The Case of Penal Statutes, p. 232.
- III. STATUTES AND RULES.
  - (1) The Statute of Monopolies, p. 235.
  - (2) Selected passages from the Patents, Designs and Trade Marks Act, 1863, p. 242.
  - (3) Selected Patent Rules, 1890, p. 247.
- IV. ILLUSTRATIVE DOCUMENTS.
  - (1) Patent Grant of James I., A.D. 1618. Annotated, p. 249.
  - (2) Proclamation in furtherance of a Patent, p. 262.
  - (3) Dispensation tending to a Monopoly, p. 263.
  - (4) Various forms of Protection, p. 264.
- V. NOTE ON *Rex v. Mussary*, p. 268.



## APPENDIX I.



### THE BOOK OF BOUNTY.

THE Book of Bounty has been frequently mentioned and its bearing upon the Statute Law has been fully discussed in the preceding pages. But as it has been lost to knowledge for a period of upwards of two hundred and fifty years it may be proper to submit in connection with its belated re-publication a succinct statement of what is at present known about it.

The principal reference to it, and that from which it derives the greatest part of its present importance, is contained in the preamble of the Statute of Monopolies. This will be found set out on pp. 22, 23, and 235 in the present volume. That allusion, however, is not very precise, and as it does not set out the title of the book it would, if it stood alone, fall short perhaps of a perfectly satisfactory identification. The deficiency is supplied by the contemporary testimony of Sir Edward Coke. He makes three separate allusions to the book. Two of these are to be found in the Third Institute in the chapters treating of Monopolies (*a*) and Penal Laws (*b*) respectively. Both passages are expressed in substantially the same terms, and they state in effect that the *Case of Penal Laws* (*c*) and the *Case of Monopolies* (*d*) were principal motives of the king's book mentioned in the preamble of the Act, and that the book was a great motive of obtaining the Royal Assent to the statute (*e*).

The third reference in Coke occurs in his comment appended to the *Case of Monopolies* (*f*), where he says, "our Lord the King that now is, in a book which he in zeal to the law and justice commanded to be printed anno 1610, intituled 'A declaration of his Majesty's Pleasure,' &c., p. 13, has published that monopolies are things against the laws of this realm, and therefore expressly

(*a*) 3 Inst. 182.

(*b*) 3 Inst. 187.

(*c*) 7 Co. Rep. 36.

(*d*) 11 Co. Rep. 84.

(*e*) See above, p. 8.

(*f*) 11 Co. Rep. 88. See below,  
p. 232.

commands that no suitor presume to move him to grant any of them, &c."

The reference here to the title and to the contents of page 13 affords a complete identification and proves beyond argument that the text now re-published is the same from which Sir E. Coke quoted.

The circumstances attending the composition and publication of this most interesting document have been sufficiently discussed from the present writer's point of view in the introductory chapter of this book (*g*). By the kindness of Professor Gardiner I am enabled here to add some comments of his contained in a letter upon this subject addressed by him to my friend Mr. A. B. Shaw.

SEVENOAKS,

*October 17, 1896.*

DEAR MR. SHAW,

I have examined the little book in the Museum Library, and quite understand why it is not included in K. James's works. It is not a personal production of his own, but an official declaration issued in his name, like any other declaration or proclamation. Though it was printed in 1610 (*i.e.*, between March 25, 1610, and March 25, 1611), it was drawn up in the end of 1608, and was one of Salisbury's many attempts to check James's extravagance. You will find it in various forms amongst the State Papers Domestic XXXVII., 72—76 (Mrs. E. Green's Calendar, 1603—10, p. 467).

The only interest that attaches itself to the date of publication is to show that it was printed in connection either with the Great Contract or with the break-up of the Parliament. I do not remember any evidence which would fix the date to the month.

The reference to it in the Statute of Monopolies is delusive. James in his declaration declared monopolies to be illegal, meaning, I believe, the grant of the right of sole selling of ordinary products in accordance with the judicial decision in the case of cards. Further on James expressly excepts the right of sole selling on new inventions. If your friend will look at my argument at the beginning of the History of England, Vol. IV., and at a paper of mine in *Archæologia*, XLI. 224, he will see that my notion is that the patents which gave offence were based on the view that the goods



protected were new inventions or (what came to the same thing) new introductions, but that from motives of public policy the definition was very loosely considered, and made to cover many things which were not fairly covered by either term.

If your friend disagrees with this view, I shall be only too glad to consider his arguments, and, at all events, he will find in the references and quotations a good deal of information on the subject.

Believe me,

Yours sincerely,

SAMUEL R. GARDINER.

As the result of inquiries made at some of the principal libraries, I have notes of the following copies of the book :—

#### BODLEIAN.

Edition of 1610.	{	Two copies of each edition. Three of the four copies are in volumes of 17th century pamphlets bound up together in modern times. The fourth was certainly not bound up before 1613. The contents of that volume are various small books—the Declaration coming first and being succeeded by a book on the Art of Jugling. (Communicated by Mr. E. W. B. Nicholson.)
Edition of 1619.		

#### BRITISH MUSEUM.

Edition of 1610. Two copies bound separately. Catalogued under the heading “Great Britain and Ireland.—James I., King.”

The press marks are 115. a. 25, and 709. a. 1.

(The edition standing at 115. a. 25, from which the annexed facsimile has been taken, was presented to the Museum by King George III.)

Edition of 1619. One copy.

Bound up with several other Proclamations and Pamphlets. Catalogued under the heading “Great Britain and Ireland.—James I., King.”

This is the seventh tract in the 1603—1627 volume of the “Burney Collection of Papers, &c.”

(Communicated by Mr. W. S. Johnson.)

**CAMBRIDGE UNIVERSITY LIBRARY.**

Edition of 1610. A perfect copy.

Bound up with several other proclamations, &c., of contemporary date (1605—1613), and all printed by Robert Barker, but having no other apparent connection with the Book of Bounty. It stands No. 3 in the Collection.

The book comes from Bishop Moore's Collection and was presented to the Library by King George III. (Communicated by Mr. H. Fletcher Moulton.)

**DUBLIN—Trinity College Library.**

Edition of 1610.

Bound up with several other proclamations and pamphlets by various printers of contemporary date (1607 to 1626), but having no apparent connection with the book. It stands No. 7 in the Collection.

This volume is classed: "DD.kk. 18, No. 7."

Edition of 1619.

Bound up with miscellaneous pamphlets. It stands No. 2 in the Collection.

This volume is classed: "P.ll. 24, No. 2."  
(Communicated by Mr. Alfred de Burgh.)

**EDINBURGH—Advocates' Library.**

Edition of 1619.

One of a miscellaneous volume of pamphlets of dates ranging from 1607 to 1626, and having no connection with one another. The binding of the volume seems to be early 18th century.

(Communicated by Mr. J. T. Clark.)

**MIDDLE TEMPLE.**

Edition of 1610. A perfect copy.

Bound with the collection of "Miscellaneous Tracts" in the Library, of which it forms No. 4 in vol. 48. (Communicated by Mr. J. Hutchinson.)

The book appears to be a small quarto, but the publishers tell me that it seems from the printer's signatures upon the pages to have been printed in octavo form and that its present appearance is probably due to cutting down. It is described as a quarto in the British Museum Catalogue.

[Facsim. 32 ps. to follow.]



A  
Declaration of His

Maiesties Royall pleasure, in  
what sort He thinketh  
fit to enlarge,

*Or reserue Himselfe in matter  
of Bountie.*



---

Imprinted at London by *Robert*  
*Barker*, Printer to the Kings most  
Excellent Maiestie.

ANNO 1610.





¶ By the King.

---

A DECLARA  
TION OF HIS  
*Maiesties Royall pleasure*, in  
what sort he thinketh fit to enlarge,  
or referue himselfe in matter  
of Bountie.



Auing so parti-  
cularly descended  
into the considera-  
tion of our Estate,  
(respecting Trea-  
sure, and Reue-  
nue, ) as we finde it full of difficul-  
ty to reduce the same, to the termes  
A 3 that



that are to be wished, by any such sudden or certaine meanes, as will not require some length of Time, and change of former Customes, both in the maner of our Expence, and of our Bountie; Wee haue thought it one of the best parts of the Care, not onely to resolute with our selues, to decline from all maner of Expence that shall not bee necessary for the safetie of Our Crowne, and honour of that Estate and dignitie (which no King can suffer to fall, but hee must run into contempt both abroad and at home) but also to take such further course as may make known to Our Seruants and Subiects; that although it is farre from Our intention to stop all liberalitie from Our  
well

well deseruing Seruants. Yet Wee  
 meane not in respect of the vaine or  
 vnneccessary Expence, of any pri-  
 uate man (or vpon false suggestion of  
 former seruices) to be drawen either  
 by the mediation of friends, or by  
 the importunitie of any partie in ne-  
 cessitie, so farre to respect or commi-  
 serate others, as to cast Our Selues  
 and our Posteritie into those wants  
 or streights, which may driue Vs to  
 lay burdens on Our People, to whom  
 Wee desire to endeere Our Selues by  
 all the Princely offices of Fauour  
 and Protection which any earthly  
 King can affoord vnto his Subiects.  
 And therefore as We doe on the one  
 part expressely forbid all Our Ser-  
 uants and Subiects (of what condi-  
 tion

tion soeuer they be ) to propound or offer any Suites to Us, by which Our People in generall may be impoueri- shed or oppressed: So on the other part We doe likewise expressly forbid all persons whatsoeuer, to presume to presse Us, for any thing that may either turne to the diminution of Our Reuenew and settled Receipts, or lay more charge upon Our Ordinarie, upon paine to be helde and reputed in either of those two kindes, as persons unworthy to enioy Our Fauour or Presence for euer. In which consideration, because Wee know not whether We may vnawares, or upon multiplictie of businesse, chance to passe any Graunt or Warrant, contrary to the Order set downe herein :

Wee

*Wee doe not onely forbid all persons whatsoeuer, (either Officer or others) to receiue any such Petitions, or Warrants, as shalbe of those natures that are forbidden in the schedule hereunto annexed ( vpon that perill which is due to such presumption ) but We doe forbid our Secretarie of Estate, the keeper of Our priuie Seale, and Our Chancelour of England, to seale any such Graunt or Warrant, before they haue enformed Vs particulerly, and receiued a new signification of Our pleasure by a new Warrant vnder Our hand. And because We haue obserued also, that the swiftnesse in preparing Warrants before the Suites be mooued, (a course con-*

B

trary

*trary to all good order , ) is oftentimes a meane to hinder the examining and distinction of mens Suits : Wee doe likewise command Our principall Secretarie , Our Masters of Requests, and all other Ministers imployed vnder Our Secretarie in that seruice, not to suffer any Warrants to be made for any Suite, before the matter haue bene mooued vnto Vs by petition, and Our pleasure signified for that Warrant which is to passe Our hand:*

*Exception. Except it be for any such Warrants or priuie Seales, as serue to direct or appoint any summes of money to bee issued for paiments, that concerne any present seruice for Our selues, or Our Estate, which are things*



things of other nature, and of greater expedition then matters of Reward.

And in asmuch as We are desirous <sup>To preuent charge of Suitors.</sup> to preuent the needlesse attendance of suiters, to their charge and disappointment, (which is little better, if not more preiudiciall, then a meere deniall,) or to leaue men incertaine, within what natures of Suites, they may containe their hopes, and when and where, they may resort for answer or dispatch : Wee haue thought good, to conceiue and declare in another Schedule, ( hereunto annexed ) the natures of such Suits wherein We are pleased to be moued. And for the maner of propounding or mouing them, We doe further de-

B 2                      clare

clare, that either Our Principall Secretarie for the time being, or some by Our appointment for him, and the Master of Requests then attending, shall haue audience of Us for all Suits that doe concerne Our Bounty once in euery weeke at least: At which time if the same shall ap-

*Limitation.* peare, to be within the natures aboue limited for Reward, Our Pleasure shall be so declared to those that doe present them, as the Suitors shall know what they may looke for, and where they shall be dispatched, according to the nature of the Suit that is moued: But if any of those Suites shall require further examination or  
*Examination* information from any of Our Officers or Commisfioners, whose know-

knowledge therein may be necessary, for giuing Us further light of the Value and Nature thereof, they shall then be referred to those whome it concerneth, upon whose Answeres and Certificates Wee will signifie Our further Pleasure, as cause shall require.

And because there may be Suits, <sup>Mixed Suits.</sup> which doe not fall within the knowledge or distinction of proper Officers and Offices ( in which cases it may be conuenient to referre the Examination of them to some such persons as may conferre with the parties, that doe present the said Suits, or those that may haue some particuler interest in the same, either in respect of trade or otherwise. ) Wee haue

Commis-  
sioners.

*thought meet ( in that respect ) to appoint a certaine number of Commissioners, to examine and consider of all such particulers, as shall be referred vnto them by Vs or Our Counsell. And to preuent the passing or graunting of any thing which should be contrary to our Lawes , We haue made Our choice of persons seuerally qualified , both in the understanding of our Lawes, and other knowledges, that they may be so much the better enabled, to report the quality of such Suits, to Our Priuy Councel after conference with the Suitors, and Examination of their seuerall natures , and the Circumstances depending thereupon , which would take too much time , from Our sayd Priuy*

*Privy Councell, if they should not be first prepared and digested by that course which is herein expressed.*

*Lastly, because We would be loth* Reseruation  
for absent  
men.  
*that those that haue not dayly accesse  
vnto Vs, should thinke themselves  
in danger still to be preuented by o-  
thers, who haue more meanes to  
mooue Suites for themselves then  
they haue; We doe declare hereby,  
that (except it be in Cases wherein  
some speciall industry of discouery  
may mooue Vs more properly to re-  
spect the first Suitor then any o-  
ther) Wee will not suffer any such  
aduantage to be taken by one mans  
neercesse more then another, as not  
to make it one of Our owne Cares  
(whosoever be the Moouer) to slay  
either*



*either the whole, or part for others,  
that deserue well, though they bee  
absent, according as Wee shall ob-  
serue, that Wee haue beene good  
vnto such a Suitor before, in some  
things else, or shall finde the Suites  
themselues to be of such Value, as  
may content more then one.*

¶ A Me-

---




---

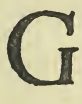
A MEMORIAL  
OF THOSE SPECIAL  
things for which Wee  
*expresly command that no Suitor  
presume to moue Us, being mat-  
ters either contrary to Our lawes,  
or such principall Profits of Our  
Crowne, and settled Reuenue,  
as are fit to be wholly reserued to  
Our owne vse, untill Our Estate  
be repaired.*

---

¶ *Things contrary to Our Lawes.*

---

I  MONOPOLIES.

2.  Raunts of the  
*benefite of any  
Penal Lawes, or of power to dis-  
C pence*

pence with the *Lawe* , or compound for the *forfeiture* .

¶ *Reserued to Our owne vse* .

3. **R**ENTS, Lands, and Leases, in *possession* or *Reuersion*, not barring the *Tenants* in *possession*, to renew their Estates, for xxj. yeeres, or *three liues* , as hath bene vsed heretofore.

4. **A**L lands *entailed* vpon the Crowne.

5. **C**USTOMES, *Impositions* , and *Seisures* for the same.

6. **L**ICENCES to *Import* , or *Export* commodities prohibited

bited by the *Law*, or any lawfull  
*Commodities*, without paying the  
 due *Custome*

7. **P** Profits rising out of Our  
*Tenures, Alienations, and*  
*Fines* leuied, or *Recoveries*, either  
*Common Recoveries*, or other.

8. **P** Profits answered vnto Vs,  
 from any of Our *Seales*.

9. **A** *Sfarts*, and *Defectiue Ti-*  
*tles*, as things onely fit to  
 be measured by the rules of Our  
 owne *conscience*.

10. **D** *Ebts* and *Accompts* wher-  
 upon there is any *Seisfure*  
 or *Stallement*, and all other *Debts*  
 C 2 and

and *Accompts* accrued since the  
xxx. yeere of *Q. Elizabeth*.

11. **T**He *Fines* of the *Starre*  
*Chamber*.

12. **N**O newe *Pensions* to bee  
granted.


*Neuerthelesse, out of the Gene-  
ralitie of the Natures abovesaide,  
We intend to be excepted the Parti-  
culars expressed in the Schedule  
next ensuing, in which We haue con-  
teined all the Natures, that Wee  
meane to haue reserued for Our  
Bountie.*

A ME-



# A MEMORIAL OF THOSE SVITS *wherein We are contented to bee moued by Our Seruants and Sub- iects, and to reward them accor- ding to the particular merit of the Suitor.*

---

1.  *Ifts of Offices in Our  
Gift, to meet and wor-  
thy persons.*

2. **K** *Eeping of Parkes and  
Walkes in Chases and For-  
rests, and keeping of Castles, Forts  
or Houses.*

3. **F** *Orfeitures of Landes and  
Goods that shal grow here-  
C 3 after*

after by *Murthers* or other *Felonies*, wherein neuerthelesse Wee doe straightly forbid all persons whatsoeuer they be, that shalbe *Suitors* to Vs for any such *Forfeitures*, if there shalbe any motion made before the *Offendours* bee duly conuicted, that they do not in any sort resort to any of Our Iudges, Iustices, learned Councell, or other ministers of Iustice, nor intermeddle directly or indirectly in the prosecution of the *Cause*, before the *Offendours* be duely conuicted, vpon paine both to bee disabled to obtaine their *Suite* or any part thereof, or otherwise to incurre Our displeasure for their contempt in that behalfe.

4. **P** Ardots in Cafes appea-  
ring vnto Vs by due *Cer-*  
*tificate* and *Commendation*, to be fit  
to receiue Our *Mercy*.
5. **E** Scheats that fhall growe  
due for want of *Heire* by  
*Bastardie* or otherwise.
6. **L** Ands that fhall be hereaf-  
ter purchafed by *Aliens*.
7. **D** Enization of fuch *persons*  
as fhall be thought fit.
8. **F** Orfeitures of *Outlawries* of  
fuch as fhall bee hereafter  
*Outlawed* after *Judgement*, and  
ftand fo *outlawed* by the fpace of  
fixe moneths, after the *Outlawrie*  
retur-

returned, and likewise of such as are already *outlawed* after Iudgement, and shall not discharge such *outlawrie* within fixe moneths next after the date hereof: with *Cautions* and *Prouision* that the true Creditors shall bee first payd their debts, and that none of Our Subiects shalbe sued by force of such *Graunt*, for any debt or other cause in Our Name, but onely in the name of the *Grauntee*, and with a Clause to be conteined in such our *Grants*, for submitting the same to Our Court of *Exchequer*, for the mitigation of the extremitie of the forfeiture, a tenth part of the benefite of such *outlawrie* so mitigated

ted to be referued to Our owne  
Vfe.

9. **P**Roiects of new inuention,  
fo they be not contrary to  
the *Law*, nor mischieuous to the  
*State*, by raising prices of *com-*  
*modities* at home, or hurt of *trade*,  
or otherwise inconuenient.

10. **D**Ebts due before the xxx.  
yeere of *Q. Elizabeth*,  
whereupon there is no *seisure* or  
*Fnstallement*.

11. **A**Lso, whereas in the *Sche-*  
*dule* of things referued  
from *Suit*, We haue made men-  
tion of *Affarts* and *Defectiue Ti-*  
*tles*, as cases fit onely to be mea-  
D fured



fured by Our owne conscience ;  
 Yet We do hereby declare, that  
 We do not vnderstand (as com-  
 prehended in that Our *reſerua-  
 tion*) ſuch *intruſions* as haue bene  
 made vpon Our *poſſeſſions* by co-  
 lour of any *Intaile*, where the *Fn-  
 taile* is ſpent, or by colour of any  
*terme*, where the *terme* is expired,  
 being matter of plaine *diſinheri-  
 ſon* vnto Vs, and that which no  
*Subieſt* in his owne *interreſt* would  
 indure : And therefore We are  
 well pleaſed, That Our *Seruants*  
 and *Subieſts* do moue Vs in caſes  
 of thoſe *two natures*. Prouided  
 alwaies, that they do not fal vpon  
 any thoſe particular *Titles* which  
 are already made knownen vnto  
 Vs,

*Vs*, and *Registred* into a *Booke*,  
*signed* by the hand of the *Chancel-*  
*lour* of Our *Exchequer*, to the  
view whereof, as occasion shall  
serue, the *suiters* may be admitted,  
to the intent he may thereby see,  
there is no cause to reward him  
for *discovery* of that, which is al-  
ready knowen; neither also that  
they meddle with any more an-  
cient *Intrusions*, but onely such,  
where the *Intrusions* haue bene  
made, since the first yeere of *K.*  
*H* 8. And that the *Suitors* sub-  
mit themselves to such *compositi-*  
*on*, as shalbe made by our *Com-*  
*missioners*, And a *tenth* part of the  
*benefit* of such *Composition* as shall  
accrue to bee referued to Our  
*D* 2 *selues*,

*selues, and Our successours, and the parties in possession, to take a new Patent, with the former Tenure reserved.*

---

*And because We are willing that those moneys which doe arise by the faults of offendours, may sometimes serue for matter of Bountie, ( to a well deseruing seruant ) after they are leuied in a course of Iustice, and moderated by those rules of equitie and discretion, with which the publique ministers doe temper the seueritie and rigour of the Lawes, and not pursued or prosecuted by priuate men, who for the most part care not how they molest, or straine the Subiect in such cases : Wee doe first declare, that Wee are pleased,*  
*That*

*That all such moneys as shall here after come into Our Exchequer, growing either upon forfeitures, or upon Fines inflicted by any of Our Courts of Iustice for notorious crimes, and misdemeanours (Our Court of Star-chamber onely excepted) shall be so distinguished and seuered in the Receipt (without being mingled with any other Treasure, nor issued for any Our owne occasions) as Wee may distribute such portion thereof, as shall seeme good unto Us, upon any man that meriteth Reward. Wherein, although Wee know Wee shall depart with many branches of those Receipts, which haue come under the Title of ordinary casuall Reuc-*

nue of the Kings of England;  
*Yet Wee haue thought it more agree-*  
*able to Honour and Iustice, and*  
*to the presidents of the greatest*  
*and wisest Princes, ( aswell Our*  
*neighbours, as Our Predecessours )*  
*when Wee are disposed to Reward*  
*any man out of such casualties, to*  
*use Our owne Iudgement for the*  
*quantitie, and not to leaue the*  
*prosecution in such cases to pri-*  
*uate men, lest when they know the*  
*particular nature of that offence*  
*from which their benefit should be*  
*deriued, they may take some such*  
*indirect and violent courses, (in*  
*respect of their owne gaine ) as is*  
*farre contrary to that Clemencie,*  
*which Wee haue euer used, and in-*  
*tend*



*tend to doe to all Our louing Subjects; hauing euer thought it as proper for Vs, ( respecting Our Kingly Office ) to be the moderatour of the rigour of Our Lawes, as to preserue them from neglect, the one leading to oppression of many, and the other to the ouerthrow and dissolution of the whole.*

*In which consideration also, whereas Wee haue beene contented heretofore ( and so are still determined ) to bestow vpon diuers persons according to their merit some portion of that Benefit which the Lawes haue giuen Vs, vpon the conuiction of Recusants. Wee doe first expressely signifie Our great dislike of such as out of desire of  
their*

*their owne priuate profit , haue taken , or shall take undue and extreme courses against any of Our Subjects , aswell by inditing them in places where they haue no residence , as otherwise ; And next , because Wee haue bene also informed , That some others , to whome Wee haue passed such Graunts , haue somuch abused Our fauours , as to presume to compound with diuers ill affected , for light summes , before any Conuiction , ( whereby the offendours in that kinde haue beene the more backward to conforme themselves : which is contrary to the godly ende and purpose of Our Lawes , that aymed not at their punishment , but at their reformation :*

formation : *Wee doe hereby commaund, that in all Graunts of like nature hereafter, a speciall Clause be inserted, that no such Graunts doe in any wise proceed to Composition with any Recusant before a lawfull Conuiction. And further, that sufficient Caution and Securitie be giuen, that We be due-ly answered of a third of those Forfeitures or Compositions, for the better vpholding and continuing of that proportion of Reuenue, which We haue heretofore receiued.*



¶ Imprinted at London  
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to the Kings most Excel-  
lent Maiestie.

ANNO DOM. 1610.



*Facsimile Reprint, 1*

## APPENDIX II.

	PAGE
1. CASE OF MONOPOLIES .....	193
2. CASE OF PENAL STATUTES .....	232



## I.—THE CASE OF MONOPOLIES.

THE celebrated action of *Darcy v. Allin* (or *Allen*, or *Allein*, for every reporter has his own spelling for this name), better known under the name attached to it by Sir Edward Coke, of the Case of Monopolies, is certainly one of the most interesting reports in the English Law Books. Whether for the mass of curious information that it contains, or for its astonishingly clear and accurate political economy—astonishingly clear and accurate, that is, in view of time and place—or for its admirable law, or for the momentous effect which it has produced upon modern jurisprudence; whether it is considered for one or another of these features, it stands out an eminent instance. Considered altogether, it is probably not too much to say that in the whole of legal history there is no other deliverance in any tongue which has proved to be so fruitful of results, nor any which has contributed more to the advancement of society in modern times. The subtle doctrine laid down by Popham, C. J., “*et per totam curiam*,” in 1603, has come to be the inheritance not of Englishmen alone but, with few exceptions, of civilised men in all parts of the world and the possession of not a few of those imperfectly civilised communities which are yet alert enough to appropriate the manners and customs of their betters.

The value, especially for the practical ends of litigation, of this celebrated case has not been altogether overlooked by lawyers of our own and other countries but it has never hitherto occurred to anyone to edit the various reports of it which have come down to us. The consequence is that, save for a few extracted passages which have become the current coin of synoptists, the case is to all intents and purposes forgotten. The best contemporary report of the argument is Sir Francis Moore's, but that, having never emerged from the twilight of black-letter, is at the present day



The authorities reviewed.  
See below,  
p. 197.

ineffective. Noy gives with great fulness the argument of Fuller, who was of counsel, and apparently the leading counsel, for the defendant in the action—an action on the patent. His argument, vehement in the extreme, has nevertheless, by a singular turn of fortune, been by the judges and writers of later times mistaken for the judgment of the Court and one particular passage from it is constantly cited as being the most accurate judicial exposition of the fundamental principle of patent law (*a*).

See below,  
p. 219.

Coke's report, published twelve or thirteen years after the event, and demonstrably inaccurate in matters of detail, is the only published memorial of the judgment, for the other two reporters stop short with the argument, and even Coke's report is usually cited from the fragment republished in Webster's Patent Cases.

The present  
edition.

Considerations suggested by these facts have prompted me to undertake the long overdue task of editing and republishing in English the entire proceedings, so far as they are now accessible, in this notable case of demurrer—for it was upon a demurrer that the argument arose. In submitting the result to the professors and practitioners of the law—although I hold myself excused from apology by the neglect of those who should have been my predecessors in the duty—I am too conscious of the imperfection of my work—done under extreme pressure of time and other occupations—to put it forward as the accomplishment of what these venerable authorities demand at the hands of a modern editor and would rather pray that it may be taken as an instalment and illustration of what is due to them—a suggestion of what may be expected when the right man becomes enamoured of the task.

Mr. Fuller.

A very few words must suffice by way of introduction, but some little space may pardonably be devoted to the satisfaction of a natural curiosity concerning Fuller, the advocate whose posthumous fame has so greatly and so strangely outshone that of the judges whom he laboured to convince. Curiously enough he is for all practical purposes an anonymous hero although his surname has been preserved both by Moore and by Noy. Coke also mentions him but as this mention occurs only in a list of counsel appearing in the case and assigns him to the wrong client it can hardly be said to invest him with anything like personality. A reference to the Book of Dignities discloses only that he was never promoted to the Bench and never wore the coif. It is difficult in such a case to

(*a*) See Hindmarch, p. 7, and any text-book writer since his time. The view universally held and more or less forcibly expressed

by all recent writers, is put very pointedly by Mr. Cunningham in his Law of Patents, p. 18.

make a begining of research into his personal history. But two Mr. Fuller. contemporary references to a person or persons bearing his name, which have come casually under my notice, may be conjecturally associated with him. Earlier in date is Fuller's case on p. 127 of Noy's Reports. Fuller there was of counsel in an *habeas corpus* with one Ladd, who was committed to prison by the High Commissioners for refusing the oath *ex officio* (b), and Fuller in his argument said and objected many things contrary to the proceedings of the High Commissioners, for which he was convented before them and committed. He brought a prohibition and in that showed the antiquity of the Inns of Court and that he was a barrister of Gray's Inn and of counsel for his fee with Ladd. Afterwards he brought an *habeas corpus* in his own interest and obtained a decision that the High Commissioners may commit to prison in consequence of which he was remanded. The case is undated but it may be plausibly placed in point of time before the case of *Darcy v. Allin* since it appears earlier in Noy's Reports.

Clearly this sturdy barrister of Gray's Inn would be just the sort of man to lead in the defence of popular liberties against a claim of patent right maintained by the two law officers of the Crown: clearly, also, if his abilities were equal to the part, he would be just the sort of man to rise to professional eminence without attaining to preferment and to win that kind of reputation which effloresces in *post mortem* fame.

The other passage which I have to catalogue here is to be found in the Parliamentary History (c), where a debate upon the naturalization of the Scots is reported which took place in the House of Commons on the 14th February, 1606. The debate was opened by Mr. Fuller, who in the course of his speech made more than one pointed reference to the case of *Darcy v. Allin*. He lays down the Sovereign's duty towards the subject in the phrase about "honeste, &c. vivere" which had so much impressed him in the Solicitor-General's speech (d), and, travelling somewhat far afield in the course of his argument, he brings in a citation of the case itself highly suggestive of the old soldier who "shoulders the crutch and shows how fields were won."

There is a third passage which might be cited, and this from the Journal of the House of Commons for the 20th April, 1614. Upon the consideration of the report of the Committee of Grievances the Glass Patent came under discussion, and Mr. Fuller is reported

(b) An oath tendered to the clergy to test their doctrine founded upon the provisions of 13 Eliz. c. 12.  
 (c) 1 Parl. Hist. 1081.  
 (d) See below, pp. 208, 213.

Mr. Fuller. thus:—"Ruled in the King's Bench against a Monopoly of Cards, which unnecessary where glass necessary. This as dangerous as the impositions. Now to glass, after to iron, after to all other trades. This like taking away the mill stone from the poor" (e). The subtle reference involved in the allusion to the millstone seems at the first blush convincing and, occurring after an interval of twelve years, appears to justify not only the identification of the speaker but also a theory that in after years he looked back upon the speech so minutely reported by Noy as one of his great efforts, possibly as his *chef d'œuvre*. Unfortunately it is hard to sustain the hypothesis with reference to both the Parliamentary debates referred to, for whereas the opener of the debate in 1606 was Richard Fuller, Esquire, the speaker in that of 1614 was Nicholas Fuller, Mercer. Still, as Nicholas followed Richard in the representation of the City of London, it is more than probable that the two Fullers were akin and that a lively interest in the great case of which, presumably, Richard had been the hero was traditionary in his family.

Such conjectures are entertaining but it is easy to overvalue them and useful therefore to recall the meagre facts which may be said to be deducible with some measure of probability from what is credibly reported. It may be taken then that Fuller was a person of some professional eminence. This may be inferred from his leading Doderidge and being put forward to argue the demurrer against Coke. That his abilities were considerable may be gathered from the estimation in which his argument appears to have been held; for it is reported at inordinate length by Noy to the entire exclusion of any other notice of the case; nor is it easy to deny the intrinsic merit of at least that passage which has become classic at the present day. And this is all that can with any confidence be said about him unless, indeed, it may be taken for granted that he never knew how large a measure of success he had in fact achieved and suffered the annoyance of unworthy misgivings and regrets as he saw inferior men winning the official recognition that was his due.

Proceedings  
in the case.

The demurrer, according to Moore's report, was argued on three several occasions. The record opens with the date, Easter, 1602 (44 Eliz.), and is numbered 435 upon the Roll (f). But nothing was done in the Easter Term, and the argument commenced in Trinity Term ensuing (f). It was opened by Altham, junior counsel for the plaintiff who was answered by Dyer, junior counsel for the defendant and G. Croke. At the conclusion of their argu-

(e) 1 H. C. Jl. 469.

(f) Moore, K. B. 671. See below, p. 200.

ment the case stood adjourned until the Michaelmas Term when the argument was resumed, apparently by Doderidge in behalf of the defendant. He was followed by Flemming, S.-G., in support of the patent and the case was again adjourned, this time to a later day in the same term (*g*). When the case was finally called on for argument, Fuller recommenced, arguing for the defendant, and the Attorney-General, Coke, replied upon the whole argument (*g*). The Court reserved judgment, which was unanimous and delivered by Popham, C. J., in the Easter Term of 1603 (*h*). (Pasch. 1, Jas. I.)

The three reporters have in a sense divided the proceedings between them. All three give the effect of the pleadings, but Coke with much greater fulness than the two others. The eleventh part of his reports, containing the Case of Monopolies, was published between the middle of 1615 and the end of 1616 and the summary of pleadings there set out was apparently extracted from the record which it manifestly pursues very closely. Moore and Noy give such synopses as practised reporters would make in Court, synopses which in all probability were produced in that way. Their reports are of later date, and were published, Moore's in 1663 and Noy's in 1656 but the reporters do not seem to have profited by the interval to supplement their original notes for neither gives the reasoned judgment of the Court. Noy merely subjoins that the case was adjourned till another day and Moore that it was adjudged in favour of the defendant.

The authorities reviewed.  
See above,  
p. 194.

The argument is given in a very compendious form by Coke. He apparently depended upon the notes which he had prepared for his own speech and which were either very succinct in their original form or much damaged when he used them for the preparation of his report. The grounds of this conjecture are these. Coke recapitulates only the argument upon the plaintiff's part. He exonerates himself from reproducing the argument in defence by the artifice of saying, "it was argued to the contrary by the defendant's counsel and resolved by Popham, C. J. *et per totam curiam*," &c., thus merging the defendant's argument in the judgment of the Court. Moreover, upon a comparison of the argument which he recapitulates with Moore's report, it will be seen that he is dealing only with the argument which he himself developed. He makes, for example, no allusion to the admissions made by the Solicitor-General, highly important although they were for the purposes of the discussion and notwithstanding that they, in a marked degree, took the wind out of Fuller's sails (*i*). Finally, there are to be found

Coke's  
Report.

(*g*) Moore, K. B. 672.

p. 226.

(*h*) Moore, K. B. 675. See below,

(*i*) See below, p. 210.



in Coke's report a number of unappropriated—or seemingly misappropriated—references to authorities for points made in Coke's own speech as reported by Moore but omitted from his own synopsis of the speech. This is precisely what would happen to a lawyer reproducing a forgotten dissertation from fragmentary materials who valued his authorities too highly to suppress them, but found himself unable, after the lapse of a long time, adequately to restore his dilapidated argument.

Moore's  
Report.

The argument thus condensed by Coke is systematically reported by Moore, whose system betrays a somewhat refined respect of persons. Altham who was junior counsel for the plaintiff is reported in sixteen lines and of eleven authorities cited by him four are correctly reported. Of the remaining seven, three are represented by imperfect references, three by mistaken references, while of the seventh I cannot speak, for it is a reference to the missing Year Book of 20 E. 3. Dyer and G. Croke, the junior counsel appearing on the first occasion for the defendant, have even more reason to complain for the reporter has not been at the pains to say which of them made the speech nor has he preserved any of their authorities or more than a headnote of the line of their argument.

When Doderidge appeared on the same side—who was to be made a serjeant in the following year and a justice of the King's Bench in the end and the studied moderation of whose championship of the public liberties was such as to befit his expectations—he obtained a very different hearing from his reporter. A folio and a half of printed matter attest the impression which he made if not upon the Court at least upon the gentle Moore. He has no reason to complain of the fidelity with which his authorities were transcribed for of twelve citations only one is apparently incorrect and that an unimportant one.

The Solicitor-General is reported in a smaller compass, but not apparently with less fulness. His speech was probably a short one, for it is manifestly directed to narrowing the discussion and bringing it to a point with a view probably to reining-in the voluble Fuller who was to follow.

Fuller, whose speech was to be the principal effort made in the defendant's behalf, is condensed by Moore into ten lines and although he is suffered to adduce four authorities, no one of them is reported with a complete reference. But if he was badly used by Moore he was handsomely indemnified by Noy, who has dedicated to the preservation of his speech the whole of a ten folio report. Little did any of these emulous lawyers imagine that the outcome

Noy's Report.



of all their garbling would be that Fuller's bold delimitation of the prerogative, which Moore would not report and the tribunal would not consider, would in later times come to be held to be not only sound doctrine in law but actually a solemn decision of the assembled judges in the first year of King James' reign and while the Court was still in its brief mourning for the last of the Tudors.

The Attorney-General—Coke—replied and his reply has been transcribed by Moore with the most becoming fidelity. The authorities are not indeed in as good order as Doderidge's but, seeing what a poor account of them Sir Edward Coke himself was able to give when he addressed himself to the reproduction of his own argument, it seems unfair to blame his reporter for such deficiencies in this respect as are to be detected in Moore's report.

For the report of the judgment we must, as already mentioned, revert to Coke's report and here it may be remarked that this is to all appearance reproduced from a full written text. The quotations and references to authorities are too numerous and too exact to have been reproduced from mere notes. It may, therefore, be inferred that Coke drew upon copious documents in his possession for both the pleadings and the judgment in this case and that only the compendium of his own argument was concocted from defective notes.

This review of the materials for a report of the Case of Monopolies will have already suggested the method of reproduction which has been followed here. Coke, supplemented in a single passage by Moore, has furnished the pleadings and Coke's compendium has been prefixed by way of introduction to the argument. This last is drawn from Moore, save for Fuller's speech, where Moore gives place to Noy and is relied on only for one or two complementary passages. The judgment is taken from Coke's report. The various constituents are indicated by distinctive type, so that the reader may dissect them out if minded so to do. The only duplicated passages which have been altogether rejected are those in which Moore and Noy have epitomised the pleadings. The reason for their omission will be obvious from what has been said above.

For the English translation of Coke I have relied upon the edition of his reports, published in 1826, by Thomas and Fraser. Moore's report has been expressly translated for the present occasion, as I have no access to the work of Hughes.

Edward Darcy, Esquire, a groom of the Privy Chamber to Queen Eliz. brought an action on the case against T. Allein, 11 Co. Rep. 84.

Action commenced  
Easter Term  
44 Eliz. Rot.  
435 (Moore,  
K. B. 671).

Pleadings.

Grant to  
Bowes.

\* 11 Co. Rep.  
85.

Grant to  
plaintiff.

Infringement.

Haberdasher of London, and declared, that Queen Elizabeth, 13 *Junii, anno 30 Eliz.* intending that her subjects being able men to exercise husbandry, should apply themselves thereunto, and that they should not employ themselves in making playing cards, which had not been any ancient manual occupation within this realm, and that by making such a multitude of cards, card-playing was become more frequent, and especially among servants and apprentices, and poor artificers; and to the end her subjects might apply themselves to more lawful and necessary trades; by her letters patent under the great seal of the same date granted to Ralph Bowes, Esquire, full power, licence and authority, by himself, his servants, factors and deputies, to provide and buy in any parts beyond the sea, all such playing cards as he thought good, and to import them into this realm, and to sell and utter them within the same, and that he, his servants, factors, and deputies, should have and enjoy the whole trade, traffic, and merchandize of all playing cards: and by the same letters patent further \* granted, that the said Ralph Bowes, his servants, factors, and deputies, and none other should have the making of playing cards within the realm, to have and to hold for twelve years; and by the same letters patent, the Queen charged and commanded, that no person or persons besides the said Ralph Bowes, &c., should bring any cards within the realm during those twelve years; nor should buy, sell, or offer to be sold within the said realm, within the said term, any playing cards, nor should make, or cause to be made, any playing cards within the said realm, upon pain of the Queen's highest displeasure, and of such fine and punishment as offenders in the case of voluntary contempt deserve. And afterwards the said Queen, 11 Aug. *anno 40 Eliz.* by her letters patent reciting the former grants made to Ralph Bowes, granted the plaintiff, his executors, and administrators, and their deputies, &c., the same privileges, authorities, and other the said premises, for twenty-one years after the end of the former term, rendering to the Queen 100 marks *per annum*; and further granted to him a seal to mark the cards. And further declared, that after the end of the said term of twelve years *s. 30 Junii, an. 42 Eliz.* the plaintiff caused to be made 400 grosses of cards for the necessary uses of the subjects, to be sold within this realm, and had expended in making them 5,000*l.*, and that the defendant knowing of the said grant and prohibition in the plaintiff's letters patent, and other the premises, 15 *Martii, anno 44 Eliz.*, without the Queen's licence, or the plaintiff's, &c., at Westminster caused to be made 80 grosses of playing cards, and as well those, as 100 other grosses of playing cards, none of which

were made within the realm, or imported within the realm by the plaintiff, or his servants, factors, or deputies, &c., nor marked with his seal, he had imported within the realm, and them had sold and uttered to sundry persons unknown, and (k) that the defendant 16 Maii, anno 44, did sell half a gross of playing cards to John Freer and Francis Freer for 13s. 4d., which were not made in England or brought into England by the plaintiff or his factor without licence of the Queen or consent of the plaintiff, he being a subject, whereby the plaintiff was defrauded of the benefit which he was to enjoy by his charter to his damages of 200*l*. (l), wherefore the plaintiff could not utter his playing cards, &c. *Contra formam prædict' literar' patentium, & in contemptum dictæ dominæ Reginae*, whereby the plaintiff was disabled to pay his farm, to the plaintiff's damages. The defendant, except to one half gross, pleaded not guilty and, as to that, pleaded that the City of London is an ancient city and that within the same from time whereof &c. there has been a society of Haberdashers and that within the said city there was a custom, *Quod quælibet persona de societate illa usus fuit et consuevit emere, vendere et libere merchandizare omnem rem et omnes res merchandizabiles infra hoc regnum Angliæ de quocunque vel quibuscunque personis, &c.*, and pleaded that he was *civis et liber homo de civitate et societate illa*, and sold the said half gross of playing cards, being made within the realm, &c., as he lawfully might: upon which the plaintiff demurred in law.

Noy, 173.

11 Co. Rep. 85.

Plea.

Demurrer.

And this case was argued at the Bar by Dodderidge, Fuller, Flemming Solicitor, and Coke Attorney-General, for the plaintiff; and by Crook, G. Altham, and Tanfield for the defendant (m).

And in this case two general questions were moved and argued at the Bar, arising upon the two distinct grants in the said letters patent, viz.:—1. If the said grant to the plaintiff of the sole making of cards within the realm was good or not? 2. If the licence or dispensation to have the sole importation of foreign cards granted to the plaintiff was

Coke's synopsis of the argument.

(k) Coke omits the details of the sale of half a gross of cards, and says only in this place, "and showed some in certain."

(l) Moore says, damage 2,000*l*.

(m) This list of counsel is certainly inaccurate. It does not appear from the other reports for whom Tanfield appeared, or, indeed, that he appeared at all, but it is quite certain that Doderidge

and Fuller appeared for the defendant, and it is probable that Moore is correct in assigning Altham to the plaintiff. Dyer in Moore's report replaces Tanfield here, and as Coke was clearly much mistaken as to the counsel, there is a certain probability that Moore, whose report was substantially a contemporaneous one, although published later, is correct on this point also.

Coke's  
synopsis of  
the argument.

available or not in law? to the bar, no regard was had because it was no more than the common law would have said, and then no such *particular custom* ought to have been alleged, for in *hiis quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est alleganda*, and therewith agrees 8 E. 4. 5 a. &c.) (n). And although the bar(o) was held superfluous, yet *that* shall not turn the defendant to any prejudice, but that he may well take advantage of the insufficiency of the declaration.

(p) As to the first question it was argued on the plaintiff's side, that the said grant of the sole making of playing cards within the realm, was good for three reasons:—1. Because the said playing cards were not any merchandize, or thing concerning trade of any necessary use, but things of vanity; and the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of servants, causes of want, which is the mother of woe and destruction, and therefore it belongs to the Queen (who is *parens patriæ, & paterfamilias totius regni*, and as it is said in 20 H. 7. fol. 4 (q), *Capitalis Justiciarius Angliæ*) to take away the great abuse, and to take order for the moderate and convenient use of them. 2. In matters of recreation and pleasure, the Queen has a prerogative given her by the law to take such order for such moderate use of them as seems good to her. 3. The Queen, in regard of the great abuse of them, and of the cheat put upon her subjects by reason of them, might utterly suppress them, and by \*consequence without injury done to any one, might moderate and tolerate them at her pleasure. And the reason of the law which gives the King these prerogatives in matters of recreation and pleasure was, because the greatest part of mankind are inclinable to exceed in them; and upon these grounds divers reasons were put, *sc.*, that no subject can make a park, chase, or warren within his own land, for his recreation or pleasure, without the King's grant or licence; and if he does it of his own head, in a *quo warranto*, they shall be seised into the King's hands, as it is held in 3 E. 2, *Action sur le statute*, Br. 48. & 30 E. 3. Rot. Pat. (r). The King granted to another all the wild swans betwixt London Bridge and Oxford.

(n) The reference is to an *obiter dictum (nota)*, by Choke, J., to the effect quoted in the text.

(o) The "bar" referred to is, of course, the custom of London, specially pleaded in bar of the action. It was superfluous as *pleading*, not as *matter*. In substance it is no more than the common law right, and therefore did not need to be pleaded.

(p) See the report of Sir E. Coke's argument on p. 223 below.

(q) The fol. should be 7. The phrase occurs in the course of Serj. Brudnel's opinion.

(r) This reference to the Patent Roll probably relates to the patent for the Philosopher's Stone mentioned by Coke in his argument, and reported by Moore. See below, p. 225.



As to the second, it was argued, and strongly urged, that the Queen by her prerogative may dispense with a penal law, when the forfeiture is popular, or given to the King, and the forfeiture given by the statute of 3 E. 4. cap. 4. in case of importation of cards is popular (2 H. 7. 6. b. 11. H. 7. 11. b. 18 H. 7. 8. b. 2 R. 3. 12. a. Plow. Com. Greindon's case, 502. a. b. 6 Eliz. Dyer 225. 13 El. 393. 18 Eliz. 352. 33 H. 8. Dyer 52. 11 H. 4. 76. 13 E. 3 Release 36. 43 Ass. pl. 19. 5 E. 3. 29. 2 E. 3. 6. & 7. F. N. B. 211. b.) (s).

The plaintiff demurred in law. And it was argued Trinity Moore, K. B. 671.

(s) This mode of citing authorities is eminently uninstructional, but it is possible to elucidate the passage to some extent.

3 E. 4, cap. 4, was an Act for preventing certain merchandize from being brought ready wrought into the realm.

2 H. 7, 6b, was a case about a patent, apparently a *sci. fa.* Many points were discussed, and it seems hopeless now to conjecture what use Sir E. Coke proposed to make of the case. The patent was upheld.

11 H. 7, 11b, is a report of great interest and importance, the authority for the distinction which Sir E. Coke so much insists upon between *malum prohibitum* and *malum in se* and for the doctrine that the king can dispense in respect of the one but not of the other.

18 H. 7, 8b. Caret.

2 R. 3, 12a. The reference is to the report which turns the page, the entry commencing in fo. 11b. It gives a case in which merchants of Waterford claimed restitution of their goods seized under an Act of Parliament providing that wool exported to the Continent should be shipped to Calais and not elsewhere. Their breach was having shipped their wool to Flanders and they justified by showing the king's licence by patent so to do. The patent was upheld. This therefore is an authority for saying that the king could dispense with an Act of Parliament by patent, provided it contained a *non obstante* clause.

To a similar effect are *Greindon's Case*, *Greindon v. The Bishop of Lincoln*, in Plowden's Reports (Commentaries), and these all were no doubt cited to establish that point.

18 El. 352, which means 18 Eliz. Dyer, 352. 43 Ass. pl. 19, and 5 E. 3, 29, are all authorities that the Crown can dispense with the law by a *non obstante* clause in a patent.

33 H. 8. Dyer, 52, shows that a *non obstante* cannot operate against an Act subsequently made, unless it be a Revenue Act, but was no doubt used in argument to corroborate those last quoted.

6 Eliz. Dyer, 225, and 11 H. 4, 76, do not in any way that I can discover tend to further the Attorney-General's argument, although the latter is important as laying down common law limits in the granting power of the Crown. It will be remembered that the Solicitor-General was himself careful to sketch these limits, and it is quite certain that Coke did not contend for an unlimited prerogative.

13 E. 3. Caret.

13 El. 393; 2 E. 3, 6, 17; F. N. B. 211b. These appear to be mistaken references. It is not improbable that the last is intended for fol. 222 of Fitzherbert's *Natura Brevium*, where the writ *ad quod damnum* is to be found.



44 Eliz. (t), first by Altham for the plaintiff and Dyer for the defendant.

Altham's  
argument.

Altham in support of the patent cites 12 E. 4, 17 (u) and 21 E. 4, 47 (x), the King can exempt one from jury service if there are others sufficient; 9 E. 4, fo. 5 (y), the King can grant offices to skilful persons, and 20 E. 3 Tit. "Corone" 137 (z), can grant that none shall wage battle against a citizen of London; 11 H. 7, 23 & 29 Ass. (a) that none shall be arrested for debt within such a precinct, and 1 E. 3, 8 (a), that every ship which arrives at such a harbour shall pay such a sum.

\* Moore,  
K. B. 672.

The King can exempt\* one from payment of toll and can prohibit playing at (b) for fear of death as 11 H. 7 fo. (b), so *semble* he can prohibit playing at cards and by consequence the use and manufacture of them, and if so, the Queen can make a limited licence as she had done to the plaintiff. And where one had a farm by charter of privilege from the Crown for which he pays if he was disturbed in the enjoyment of the profits (*si'l soil disturb des profits*) he shall have an action on the case and shall be declared in contempt of the King (c) and for that he cited 11 H. 4, 64 (d). And for disturbance of a grant of a fair he cited 21 H. 6, 14 (e) and 9 H. 7, 5, and 18 H. 8 (f). Where the sheriff returns

(t) *I.e.*, Trinity Term, 1602.

(u) These references are to pages in the Year Book.

12 E. 4, 17=Mich. 12 E. 4, pl. 22, a case of grant by patent to the burgesses of T. that they shall not be impleaded without the city.

(x) 21 E. 4, 47=Mich. 21 E. 4, pl. 6, a long report of the discussion of a charter of exemption from a di-me voted by the Convocation of Canterbury. The passage in question is a little below the middle of fo. 47 of the Year Book, and is a dictum by Fairfax, J., to the effect of the proposition laid down by Altham.

(y) 9 E. 4, fol. 5=East. 9, E. 4, pl. 20, in which a question arose of a patent to appoint an officer of the Court. The office in question was master, boucher or cursitor, and the dictum cited appears to cover all these offices.

(z) 20 E. 3, Caret.

(a) I can make nothing of this reference.

(b) *Sic*.

(c) This last proposition must, of course, be understood of the disturber.

(d) 11 H. 4, 64=East. Term, H. 4, pl. 19, *Clerk v. Abbot of Towerhill*. The case seems to have been tried in the C. P., and the rule laid down is stated to be a doctrine of the Exchequer. It does not appear whether it would be recognized by "this Court," but quite probably not.

(e) I can make nothing of this reference.

(f) This reference is almost certainly to the *Anonymous Case*, Mich. 18 (? 19), H. 8, p. 5, pl. 21. There is a misprint in the Year Book which makes it uncertain whether the year should be 18 or 19 and the case is cited sometimes under the one and sometimes under the other date. The case was, that a citizen of N. pleaded the King's charter of exemption from jury service. The power of the King to grant such a charter was admitted but it was said that it could only be allowed if there were enough jurors present to try the question, if raised, whether the claimant was or not the person entitled to the privilege of the charter.

one as a juror who is exempt by charter an action on the case will lie.

Dyer and G. Croke (*g*) who argued against the patent insisted upon public equity that the Queen could not grant a patent to restrain any from their usual trades and occupations and that no occupation can be prohibited or put in monopoly but only such a thing as is newly invented by the skill of a man to whom it can be appropriated by patent. Dyer's (qu. Croke's) argument.

And afterwards—Mich. 44 & 45 Eliz. (*h*)—the case was argued by Dodderidge (*i*) against the patent and by Flemming (*k*) Solicitor for the patent. And afterwards in the same term by Fuller (*l*) against the patent and Cooke (*m*) Attorney-General, for the patent.

And Dodderidge said that the case was tender, concerning the prerogative of the Prince and the liberty of the subject and ought to be argued with good caution, for “he that hews above his hand, chips will fall into his eyes,” and *qui majestatem scrutatur principis opprimetur splendore ejus*. Nevertheless because it is the honour and safety of the Prince to govern according to law by reason of the mutual relations between them, as Bracton says, *merito retribuatur Rex legi quod lex attribuat ei*, therefore the Princes of this realm have always been content that their patents and grants should be examined by the laws, and so is her Majesty that now is. In these examinations it had always been held by the judges that the Queen's grants procured contrary to the usual and settled liberty of the subjects are void and those also which tend to their grievance and oppression; and he cited 2 H. 5, fo. 5, where a master took a bond from his servant that he should not exercise his trade within the town and adjudged a void bond and more-over a contempt of the Crown, and the party imprisoned (*n*). 21 E. 4, fo. 79, a patent was granted of an office of brocage to one Molle; *semble* void because contrary to reason that the subject should not make a bargain without a broker. 1 H. 7, fo. 10, the king caused alum taken from the Florentine factors of the Pope to be restored because otherwise the goods of his merchants in foreign parts could be taken from them. Trin. 41 Eliz. in the King's Bench, between Davenant and Doderidge's argument.

(*g*) Dyer and Croke were apparently junior counsel in the case. Croke may be the same who subsequently became a justice of the C. P. and K. B. That would be upwards of twenty years later.

(*h*) *I.e.*, Mich. 1602.

(*i*) Probably John Doderidge who became a serjeant-at-law the following year, S.-G. in 1603, and Justice K. B. in 1612.

(*k*) Sir Thomas Flemming or Fleming or Flemyng, afterwards Ch. Bar. Exch. (1604), and Ch. Jus. K. B. (1607).

(*l*) As to Fuller's identity, see above, p. 194.

(*m*) Sir Edward Coke, of course.

(*n*) This seems to be a mistake; see above, *Case of John the Dyer*, p. 26.

Doderidge's  
argument.

\* Moore,  
K. B. 673.

Hurdes, it was adjudged that a bylaw made by the Merchant Tailors that the cloth workers of their Company only should dress one-half of the cloth which the Drapers of the Company put out to be worked was void because a monopoly (*q*). 50 E. 3, Rot. 33, and the Parliament Roll, it appears that one Pechy had obtained a patent\* that he alone should sell sweet wines, which patent was brought into Parliament and there adjudged to be void and cancelled (*r*). He agreed that patents of offices and privilege of a fee to be taken for the exercise of them were good and legal, that is to say, the office of Aulneger, Clerk of the market, Tronage *et similia*, because the subjects derive advantage from those public offices in their contracts, and he also admitted that the privilege of sole printing was good for it was necessary for the peace and safety of the realm. He admitted also that the King can prohibit commerce and traffic with foreigners, and this is proved by *Magna Charta*, cap. 30. *Omnes mercatores habeant saluum et securum conductum exire de Anglia et venire in Angliam nisi publici antea prohibiti sint*. He also admits the case of the Archbishop of York in the Register fo. 105 (*s*) where he had a custom in his manor of Ripon that none should keep a dye-house without his licence, but that was not by patent, and custom can do what a patent cannot do, as 37 H. 6, fo. 27 and 37 H. 8. Brooke, Patents 100 (*t*), a custom makes Borough English, Gavelkind and Ancient demesne, which a patent cannot do. He cited the case of the Abbot of Westminster in the Register fo. 107 (*s*), where he brought an action on the case counting that he had a fair by patent for 32 days with an express privilege that during that time no one should buy or sell merchandise within a compass of seven miles elsewhere than there. And 12 E. 4, 17, the King can appoint to his subjects certain persons and certain places for obtaining justice (*u*). And he cited 40 E. 3, 18 that the King by his prerogative can grant privileges which appear

(*q*) See Moore, K. B. 576, and 11 Co. Rep. 86.

(*r*) In point of fact the record in the Parliament Roll is, that Peechy—or Peechee as he is there called—was called in question for going beyond his patent and practising extortion under colour of the grant. The validity of the patent would seem to have been taken for granted, for the Commons petitioned that the patentee might be compelled to account to the King for 10s. a vessel of sweet wine, "according to the form of his patent." This occurred in the year 1376.

(*s*) The "Register" is of course the *Registrum Brevium*.

(*t*) The passage cited from Br. Abr. contains this proposition. I can make nothing of the first reference which is probably mistaken or of the second which is incomplete. The second has been extracted without correction from Brooke.

(*u*) The case cited is of a charter to the burgesses of "T.," granting to them the privilege of not being impleaded beyond the borough. Y. B. loc. cit. pl. 22.

*primâ facie* contrary to the common weal, yet are *pro bono publico* (x).

And, for the principal case, it appeared that the patent was void for three reasons.

First—The sole power given to Darcy to sell cards without limiting any price, thus enabling him to sell at unreasonable prices, would cause great oppression : Thus 27 Ass. pla. 44 is a case of inquest to inquire concerning those offenders who sell at unreasonable prices (y), and 43 Ass. a merchant was indicted because having engrossed a commodity he sold it at an excessive price (z).

Second—The language of the patent is contrary to its meaning, for the intention is to suppress the multitude of cards and yet the liberty is not limited, but permits Darcy if so minded to make more card makers than before by way of deputies and factors.

Third—It is a thing which tolls the inheritance of those haberdashers who were wont formerly to vend them in their trade, and he said that card making was an ancient trade, because 3 E. 4, ch. 4 (a), the statute in the preamble says that for the advancement of card making in England it was provided that none should bring foreign cards into the land.

Flemming said that the true power of the Prince is to take effect in these five things :—

1.—*Imperando honesta*. 2.—*Prohibendo injusta*. 3.—*Permittendo media*. 4.—*Puniendo delicta*. 5.—*Munerando benefacta*.

And therefore a patent is void if the King makes it contrary to these five things.

\*1. The patent ought not to change the law.

2. It ought not to be contrary to justice and common right.

3. It ought not to impose upon the subject an unprofitable charge (*un charge sans profit*).

4. It ought not to do wrong (*faire tort*) to the inheritance, liberty or trade of the subject.

(x) The question here was of the privilege of the "Clerks of Oxford," to bring certain causes for trial before the Chancellor of Oxford, the *primâ facie* appearance of being contrary to the common weal arising from the fact that the other party to the cause—who might be a layman—was thereby ousted from his recourse to the common law.

(y) The Liber Assisarum forms a part of the Year Book in the reign of Edward III. The record for the 27th year appears to have been mutilated, and the placita

from 27 to 44 inclusive are missing.

(z) This reference is incomplete, but the case referred to is probably that of "a Lombard," 43 Lib. Assisarum, pl. 38. The charge seems to have been of *using* to procure and promote the enhancement of prices.

(a) A.D. 1463. The statute was made for the encouragement of home industries in general by prohibiting the importation of foreign manufactured goods. Playing cards are an item among many others.

Solicitor-General's argument.

\* Moore, K. B. 674.



Solicitor-  
General's  
argument.

But nevertheless all general propositions admit particular exceptions, for *privilegia non debent passim omnibus indulgeri*. 13 E. 4 fo. 10, one who had waifs by prescription seized waifs belonging to a merchant stranger who had a patent of safe conduct *et non admittitur* because the patent tolled the benefit of the prescription in this special case (b). So it is in the case of public justice. Offenders guilty of felonies and treasons suffer death, yet the King can pardon special persons but not all. So the King can grant privilege of digging saltpetre in the land of other persons because of and for the defence of the realm. And he cited a case where William the Conqueror granted to the City of Winchester a privilege in respect of a fair that none should sell elsewhere during the fair save within a certain precinct and this continued in use until 18 H. 8 when it was dissolved by composition. 2 E. 3, the King restrained all persons from importing sweet wines at any port except Southampton and it was held good. And as it respects trades he said that the end of them is *vivere tuto, commode, pacifice, jucunde, honeste et beate* but it appears that the trade of card making is ancillary to the vices of deception by servants of their masters and misemployment of time which ought to be applied to other industries and not to such enormities, therefore the King may prohibit it by patent.

(b) The meaning of this sentence is obscure, and I doubt whether the Sol.-Gen. cites his authority quite accurately. The case was, that a merchant stranger having a safe conduct—"salvum et securum conductum tam in corpore quam in bonis"—from the King intrusted certain bales of goods to a carrier to be taken from London to Southampton. The carrier broke bulk and converted the goods to his own use. They were, however, recovered and thereupon rival claims to them arose. The merchant claimed them as his own goods, the sheriff of London claimed them as waifs by reason of the felony. Thus two questions arose. Was the conversion a felonious taking? If so, did the felonious act cause the goods to vest in the sheriff as waifs? The first question gave occasion for great diversity of judicial opinion but the majority held that the breaking bulk made the conversion felonious, a doctrine which

has since that time become well established as the doctrine of the common law. Upon the second point they held that in the case of a merchant stranger, who was not bound to know our laws, the safe conduct must be interpreted to be a covenant by the King and such a covenant as would preclude the King himself from setting up in similar circumstances a claim to the merchant's goods although waifs by our municipal law. But if the King could not have them the King could not grant them and therefore the sheriff could not prescribe for them, a line of argument proceeding obviously upon the rule that prescription presumes a lost grant. The meaning in the text therefore is that the claim by prescription was not admitted, the sheriff's right being held to have been taken away by the patent. But this is hardly an exception under the solicitors' four rules.



\* Mr. Fuller :

\*Noy, 174.

Fuller's  
argument.

THIS cause is of great weight and to be dealt in with good regard for, on the one side, it concerneth the prerogative of the Queens Majesty in a material point thereof and on the other side it doth concern many of her Majesties subjects in present and in the rule thereof it may concern all the subjects in *England*. And yet the cause is such as may, yea ought to be, disputed and censured before Competent Judges as this Court is. For I learn in Bracton, *lib. 1. cap. 8.* thus. *Ipsæ autem Rex non debet esse sub homine sed sub Deo et sub lege quia lex facit regem, attribuat igitur Rex legi quod lex attribuat ei.* And after he saith, *Non est enim Rex ubi dominatur voluntas et non lex*: which latter words, as also the cases following, prove the intent to be *sub lege loquente*. According to the opinion of Bracton it is said, 19 *H. 6. fo. 62*, That the Law is the most high inheritance of the Realm by which the King and all his subjects are governed and that if the Law were not there would neither be King nor inheritance; for to outrun the Law, is to hast to confusion.

This Law all subjects are bound to obey and the Queens Majesty hath given her assent to perform the same in some sort at her coronation by her Oath which I know not precisely what it is. But I find by the Statutes of 2 *E. 3. (c)* and 14 *E. 3. (d)*, and others, that the King shall grant no pardon contrary to his oath and that if he do grant any such pardon contrary to his oath it shall be void; which sheweth that his oath referreth to some rules of Law. And to come near to the point of prerogative it is said in the Commentaries *(e)*, *fol. 236*, that the Law doth so admeasure the Kings prerogative that it shall not tend to the prejudice or hurt of the inheritance of any of his Subjects.

Being thus inabled to speak in this weighty cause, to the intent that the whole course of my argument may the better be conceived I have divided that into these heads.

1. That all Patents concerning the King and his subjects are to receive exposition and allowance how far they are lawfull and how far not by the Judges of the Law.

2. That the Judges in the exposition of the Kings Letters Patents are to be guided not by the precise letters and words of the Letters Patents but by the Laws of the Realm, the Laws of God and according to the antient allowance thereof. And herein I mean the Laws of God because we are now the house of God and the people of God, the Jews being cut off to whom God was the Law-giver and we being ingrafted in their stead so as the Judgements that are executed are not

*(c)* 2 *E. 3. cap. 2.*

*(d)* 14 *E. 3. cap. 15.*

*(e)* *I. e.*, Plowden's Reports  
(called Commentaries).

Fuller's argument. the Judgments of men but of God and he is with them in the cause and in the Judgement.

3. That the Letters Patents made to the Plaintiff are contrary to the Laws of the Realm, contrary to the Laws of God, hurtfull to the Commonwealth and in no part good or allowable.

\* Noy, 175.

\* 4. That the action upon the case grounded upon this void Patent is no lawfull action.

5. In the last place I will answer all the material matters and cases that have been alleged on the Plaintiffs part to the intent that this Monopoly Patent should have no ground to stand upon.

See above,  
p. 207.

In the argument of this case I am eased much for that it is confessed by Mr. Solicitor, who very learnedly argued on the part of the Plaintiff, that such Letters Patents as tended to change the Law or course of any mans inheritance or that was *contra commune jus* or that tended to any general charge of the Subjects were void in Law, for which I meant to have put divers Cases which I omit.

It is agreed by the Court that the grants of the King shall not be expounded according to the Letter but according to the antient allowance and, to prove the same, I will put some particular cases.

The Kings grants in many cases are controlled by the Judges of the Law for the benefit of the King contrary to the expresse letters of the grant. As when the King granteth the Mannor of Dale and all manner of woods, underwoods, mines and quarries in the same yet mynes of gold and silver shall not passe. And so when the goods and chattels of persons *qualitercunque damnatorum* are granted yet the goods of persons attainted of treason passe not because by rule of Law these things of prerogative will not passe by such general words. So in Cases that concern the Subjects as shall hereafter appear the Judges shall controll Patents contrary to the Letters because they have like rules of Law so to do, whereby it shall appear that the Judges stand indifferent between the King and his Subjects, for which many cases more might be put on the Kings part, for power of Judgement is so committed to the Judges.

Now I will show you that Patents shall be controlled for Justice sake albeit they do concern but particular persons and not generall ones.

Limitation  
of the  
prerogative.

The King granteth to *I. S.* that he shall not be sued by *N. T.* this is void (*g*). So when it is more particular. As when the King doth grant to the Chancellor of Oxford that he shall not be sued for debt or trespassed concerning his office

is void (*h*). And when the King doth grant *Conusans de plee licet ipsemet fuerit pars*, or generally, not naming before whom it is void for the reasons abovesaid being contrary to the rule of Justice (*i*).

A Commission is granted under the great Seal of *England* to persons of Credit, to take the bodie and goods of *I. S.* without indictment and due proceeding according to Law. This is adjudged unlawful (*j*).

A Commission is awarded to persons of credit to examine the title of *Scrogges* concerning the office of exigenter and to commit him to prison, if he refused (*k*). *Scrogges* refused and was committed to prison but was delivered by the Judges of the Common place (*l*) upon a *Habeas \*corpus* as an unlawful \* Noy, 176. imprisonment; the reasons I gather to be these, The Law knoweth no commandement but by writ nor no minister to execute the commandements of the law but the sheriff and the officers under him for he is the only lieutenant in the time of peace, who is to be guided by the law and to be controlled if he follow not the course of law in the commandements of the King or of the law.

For Commissions to subjects of any absolute power which be occasions of absolute wrongs as the law knoweth them not so the law alloweth not such proceedings. I do not here speak of Justices of peace, who have power given them by divers statutes, who if they exceed their power are to be punished by law nor of Commissioners of Bankrupts, nor of Sewers which are grounded upon particular Acts of Parliament.

Now touching Patents that tend to prejudice or to charge particular subjects how they are to be controlled I will put some cases.

20 acres of Land are holden of the Bishop of *Winchester*, by *I. S.* (*m*). *I. S.* granteth the same 20 acres to the King to the intent that the King should grant them in mortmaine to a Monastery which is done accordingly. Afterwards notwithstanding that the grant to the King were lawfull and the grant of the King to the Monastery in itself is lawfull, yet because it tended to take away the mean surrender of the Bishop of *Winchester* upon Petition it was repelled (*n*).

The King granted to *A. B.* his servant the office of measuring of cloth in *London* (*o*) with a fee and a writ was awarded to the Mayor and Sheriffs of *London* to put him in possession

(*h*) 1 H. 4, fo. 6.

(*i*) 44 E. 3, fo. 27; 6 H. 4, fo. 1. Pet. 19.

(*j*) 42 Ass. p. 5.

(*k*) 23 Eliz. Dyer, 175.

(*l*) *Sic., sed qu. Pleas.*

(*m*) 19 E. 3, fo. 39; 46 E. 3,

Pet. 19.

(*n*) Qu. repeled=repealed.

(*o*) 13 H. 4, fo. 15.

Fuller's argument.  
Limitation of the prerogative.

thereof, who refused to put him in possession and returned that there is no such office in *London*. Hereupon it is excellently argued by the Judges how far the King may charge his subjects by his patents and agreed that, without the Parliament, the King cannot grant any new office with charge (*p*) to charge the Subjects. And although in this case there had been a former grant of this office to an other man deceased and that he had executed the office and received some fees for a time yet the Judges thought that seisin by wrong upon an unlawful patent to be of no force.

It is agreed that the King cannot grant toll to be taken in the highway which is free (*q*) but pontage and murage may be granted because there is *quid pro quo* and no longer than the bridge is maintained for use of the Subjects nor (*r*) shall continue for defence of the subject the toll is not due to be paid for the pontage nor for the murage.

Like learning in the cases of the office of brocage, tonage &c. and the difference between the Clerk of the Market and such offices (*s*).

*I. S.* is indebted to *R.* in 20*l.* by contract. *R.* is outlawed, the Queen shall not have this debt for the Queen shall rather lose this debt than the subject lose the benefit of waging of Law (*t*), wherein it is to be noted how indifferent the Law is for the Subject.

\* Noy, 177.

\* The King shall not arrest one for suspicion of felony or treason because if it be without cause the subject hath no remedy. By *Markham*. So that the King shall rather lose the liberty that a subject hath than that the subject shall lose the benefit of his action (*u*).

To come near to the point of prerogative; the King did grant a protection, *quia profecturus*, to *I. B.* and sheweth it was for the service of the King and of his Realm at *Rome* to continue for 3 years, *et sit quietus ab omnibus actionibus sectis* &c. and it was refused by the Judges for that it was for 3 years and the law alloweth but for one year. And for that there was not exception of dower, *quare impedit* and assize as should be in such protections (*x*).

A protection was granted to *I. B. quia profecturus* in a voyage royal with the King into *Ireland* and rejected by the Judges because it was no voyage royal into *Ireland* (*y*), otherwise

(*p*) *Sic. qu.* power.

(*q*) 13 H. 4, fo. 15; 50 E. 3; Br. Ab., tit. Patent, 112.

(*r*) *I.e.*, nor the wall shall continue, &c.

(*s*) 22 H. 6, fo. 14; 21 E. 4, fo. 1.

(*t*) 49 E. 3, fo. 5; 50 Ass. p. 1; 16 E. 4, fo. 4.

(*u*) 4 H. 7, f. 4; Br. Ab., tit. Prerogative, 139.

(*x*) 39 H. 6, f. 39.

(*y*) 1 E. 4, f. 29.



in *Scotland*. *Per Noyle*. Note that these protections are not to take any thing from the subject but tend only to delay the lawful sutes of some particular subjects and yet rejected as abovesaid.

Now touching the Kings mercy, how that shall be controuled for the good of the subjects it is meet to see.

The King doth pardon *I. S.* the making or repairing of a bridge which he ought to do. Now for that in this bridge the subjects have a use or kind of interest for that reason the pardon is void. 2 *R. 3.* *Rex potest dare licentiam alicui ad deferendum literas apostolicas infra hoc regnum, ubi tantum regem tangat, sed non ubi tangat partem.*

Thus it appeareth how all the attributes given to the King of power, justice and mercy are in him to dispose to the good of the subjects; that justice controuleth both the power and mercy in grants, commissions, protections, pardons as for the good of the subject in the time of 1 *E. 3. H. 4. H. 6. E. 4. H. 7. &c.* Why did the Judges withstand the Kings letters patents in this sort? And why are these things recorded and left to us but that it may appear to the ages following what great care those reverend Judges had to leave the land and people in like liberty to the ages following as they found it and so ought every man in conscience in his place to have the like care.

Now touching this particular Patent.

The pretence is chiefly upon this, *viz.* that the Queen may restrain all card-playing and then by consequence all making, buying and selling of cards because for the good of the whole Common wealth the card-maker or seller may receive particular losse in his trade. Darcy's Patent.

First it is not to be confessed that the Queen may by letters patents without Parliament restrain all card-playing which I will prove by reason, use and by intent of statutes.

For this is true without any contradiction, that no man can continue always in labour, always in reading or always in meditation but he must have reasonable recreation and all persons cannot take recreation\* abroad for some be sick, weak or impotent that need refreshing, some seasons are such as that there is no recreation abroad and in these times and to these persons to make restraint is wrong. \* Noy, 178.

For as Mr. Solicitor said that the benefit of government was not that the subjects should live safely only but *tute vivere, pacifice vivere, honeste vivere, et jucunde vivere*. And the law in ages past alloweth as much. For *Cicero* saith that *lex est vinculum civitatis fundamentum libertatis & fons æquitatis*; and how can it be said that freemen should, according to the Statute of *Magna charta* (z), use *libertatibus et liberis consuetudinibus* See above, p. 208.



Fuller's  
argument.

*suis* when Mr. *Darcy* hath a Patent to restrain cards, another to restrain tennis play, another hawking and hunting &c. Is not this to make freemen bondmen? And if the Queen cannot to maintain her war, take from her subject 12*d.* but by Parliament much lesse may she take moderate recreation from all subjects which hath continued so long and is so universal in every country, city, town, and houshold; but to punish the abuse is necessary: For Common weals are not made for Kings, but Kings for Common weals (*a*).

The Statutes of 12 *R.* (*b*) 11 *H.* 4. (*c*) do shew plainly that none were restrained from playing at dice but servants and they not altogether restrained but at times and from card-playing none restrained until 33 *H.* 8. (*d*) and in that Statute certain persons and certain places restrained which declareth the intents of the Parliaments to be that it should be lawful for the rest not restrained and for them restrained in the times prescribed for times for them to play in.

And if in the times of *K. R.* 2. *H.* 4. and 5. it was thought necessary to have several acts of Parliament to restrain the use of playing in servants much more is it necessary to have an act of Parliament to restrain all the subjects of the Realm from the moderate use of playing and not by Letters Patents only.

Darcy's  
Patent.

But, allow that the Queen could restrain Card-playing, yet that proveth not that this Patent is good which restraineth not the place (*e*) but rather increaseth playing at cards and taketh away the trade of making and selling of cards from many subjects that used it well and giveth it to another that knoweth not how to use it; for thus should the argument be to uphold this monopoly Patent.

<p><i>Major.</i></p> <p><i>Minor.</i></p> <p><i>Conclusio.</i></p>	<p style="font-size: 3em;">}</p>	<p>All Patents made for the general good of the Realm may restrain some subjects in their particular trades lawfully.</p> <p>But this Patent is made for the general good of the Realm.</p> <p>Therefore this Patent may restrain some in their particular trades lawfully.</p>
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The Minor proposition or assumption is untrue and that I will prove so plainly as no man shall gainsay that and so the force of these Letters Patents must needs fall to ground.

(*a*) Coming upon a passage such as this one is sorely tempted to exchange conjecture for belief that the speaker was the same Fuller of Gray's Inn, whom the High Commissioners committed for "saying and objecting many things against

their proceedings." See above, p. 195, and Noy's Rep. 127 (*Fuller's Case*).

(*b*) 12 *R.* 2, cap. 6.

(*c*) 11 *H.* 4, cap. 4.

(*d*) 33 *H.* 8, cap. 9.

(*e*) *Qu.* play.

\* Before the making of these Letters Patents many subjects were set on work in making of cards as the preamble of the Patent doth partly expresse and as in truth it is for that many carvers, painters, carpenters, card-makers and card sellers maintained themselves, their children and families by their trade. And now Mr. *Darcy* hath power to bring all from beyond seas contrary to the intent of the statute of 3 *E.* 4. *cap.* 6. (*f*) 1 *R.* 3. *cap.* 12. and to restrain all the subjects from making and selling of the same which is a manifest hurt to the Realm by the opinion of two parliaments.

\* Noy, 179.  
Mischief from  
the Patent.

Where before this Patent men skilfull in the trade being subjects born, and brought up 7 years as apprentices in the trade, according to the Statute of 5 *Eliz.* (*g*), were employed in this work in due order to be seen and corrected by the Wardens of the company, now Mr. *Darcy* may set to work in this trade I. a Do ne (*h*) and his fellows without any view search or correction. Yea he may set a work only strangers if he will which is also hurtfull to the Realm.

Where before cards were and ought to be sold at reasonable prizes or else to be punished as inhauncers of merchandize as appeareth 27 *E.* 3. by the common laws of the Realm (*i*). Now Mr. *Darcy* by the words of this Patent may sell cards for his most advantage, as he doth, *viz.* one grosse for 35 s. where the haberdashers have offered to sell better for 20 s. the grosse and this is *malum in se* against the Common Law that cannot be dispensed with by patent as *malum prohibitum* may be.

Where before if any made naughty and false cards one might buy of others better cards for that there were then many makers and many sellers. Now by this Patent, be they good, be they bad; be they false, be they true; be they dear, or good cheap you must buy all of him and his assignes in what manner pleaseth him.

Where before if any person by his industry had obtained excellent skil in his trade he might have reaped the fruits thereof and that hath been thought the surest thing a man could obtain,—skil and knowledge because theeves could not steal it. Now Mr. *Darcy* hath devised a means to take away a man's skill from him, which was never heard of before, which, if others should do the like in other trades, it would discourage men to labour to be skilful in any art and bring in barbarism and confusion.

Where by the lawes of God the poore and the stranger were to be relieved with the gleaning of the harvest and the latter grapes of the vintage Mr. *Darcy*, by his Patent may take all the harvest and vintage of this trade from the

(*f*) So printed in Noy's Rep. but no doubt 3 *E.* 4, *cap.* 4 is meant.

(*g*) 5 *Eliz.* c. 4, s. 24.

(*h*) *Qu.* a clowne.

(*i*) The reference here is, no doubt, to the case cited by Doderidge, from 27 *Lib. Ass.* See above, p. 207 n. (*y*).

Fuller's  
argument.

\* Noy, 180.

Mischief  
resulting from  
the patent.

natural subjects & give it to strangers and not leave so much as the gleanings of the harvest or latter grapes of the \* vintage for natural born Subjects, which is an hateful thing :

And may not these subjects thus put from their trade, say as the Steward in the Gospel said, when he was put out of service, *What shall I do? digg I cannot, and to begg I am ashamed, I will use this fraud, &c.* And if none will trust them to be beguiled, then will they robb and steal, and become thieves and traitors: for extremity breedeth nothing but thefts, and then what comfort this will be to him that procured this mischief, I leave to God and his own conscience, remembering this withall, that *Bracton* saith, It is a good part of a King to reject no person, but to make every person profitable to the Commonwealth. And *Cicero* saith, *Qui autem parti consulunt, partemque negligunt, seditiones & discordias inducunt.*

Now to prove that it is against the Law of God and Man.

The Ordinance of God is, that every man should live by labour, and that *he that will not labour, let him not eat (e).*

This general Ordinance of God, by the policy of the Realm, and by the laws and customs of the same, is distributed into several arts manual occupations and trades, whereby we may have the mutual help one of another, and all governed in due order by the Wardens and Governours of the same society and fellowship.

Now therefore it is as unlawful to prohibit a man not to live by the labour of his own trade, wherein he was brought up as an apprentice, and was lawfully used, as to prohibite him not to live by labour, which if it were by act of Parliament, it were a void act: for an act of Parliament against the law of God, directly is void, as is expressed in the book of *Doctor and Student*, much more Letters Patent against the law of God are void(f).

But Mr. *Darcy* will say this is no necessary trade and therefore, &c. so others may say the like of silk lace, another of womens tyers, another of gilt rapiers and gilt daggers, and some already have added a reason for the only making of *aqua vita*, *aqua composita*, vinegar & allegant throughout the whole Realm, whereby the several trades that now maintain many thousand good subjects may be cut off by Letters Patents at an instant upon bare suggestion, which ought only to be done in Parliament; where amongst the assembly of such wise men, some will consider the inconvenience, some the damage, some the profit, some the mischief; some what is meet for this place, some for that place: Therefore it is well said of *Plato*, except wise men be made governours, or governours made wise men, mankind shall never have quiet rest, nor vertue be able to defend it self.

(e) 2 Thess. cap. 3, v. 10.

(f) Dial. I. ch. 4.

Now I will put a case of the Common Law. *I. S.* is bound to *A. B.* in 40*l.* that he shall not use the trade of a dyer in the town of *Dale* for the space of half a year. The condition of this bond is thought to be against the Law, to restrain a man from his lawful trade, though it were but in one town and but for half a year (*g*): much more this Patent, which is to restrain men from their trade 21 years, and throughout the whole Realm. The like Patent whereof is not to be found in any record, or \*in any Book-case within this Realm, since the conquest, until within 20 or 30 years last past, which I doe more confidently affirm, because Mr. Sollicitor, being a very learned man, and others who have argued in this Cause for the Plaintiff, after much search and study cannot find any such Case or record. \* Noy, 181.

I will put other cases where the laws of God and the laws of the Realm do agree, as one squared by the rule of the other, to confound this monopoly patent.

Thou shalt not take to pledge the upper or nether milstone, for it is his living (*h*). By this law none may take to pawn that which was the living of an other and so to force him to seek an other trade, though constrained by need, he give his consent thereunto.

But Mr. *Darcy* will take from men against their wills, their living and lawful trade, and force them to seek other trades, directly contrary to the law of God.

Agreeing to this rule of God are these book-cases, viz. That none shall distrain, which is a kind of taking to pledge, the upper or nether milstone; yea, though the milstone be not then upon the mill, but lieth in the house to be picked, because it is his living, where the other goods in the house are distrainable by law (*i*).

In like manner the anvil in the smiths shop, the garment in the taylors shop, the horse within an inne, or at a smiths forge a shooing, are not distrainable, because it is their trades and living, although the rest of the goods in the house are distrainable (*k*).

This difference I have alwayes thought reasonable, that because justice floweth from the Queen, as from the head or fountain of justice, that therefore she may grant or restrain the same, more liberally or more sparingly, as she thinketh good, according to the rules of law.

As to grant conusans of plea in such actions, within such precincts as she thinks good, and to save the defaults of the tenant by writ of *warrantia diei*, giving of power to make attorneys in Court by *dedimus potestatem*, and such like things.

(*g*) 2 H. 5, fo. 5.

(*h*) Deut. 24, 6.

(*i*) 14 H. 8, fo. 25.

(*k*) 22 E. 4, 49.



Fuller's  
argument.

But arts and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the Commonwealth, and of the King, the head thereof, and do meet with commutative justice by the way, to see that there be just measure and just weight in things to be measured and weighed; and that no deceit or fraud be used therein, to the deceit of the subjects, and for that purpose the office of the clerk of the market, gager and garbler, &c. are used; but to restrain men from any lawful trade wherunto they are inclined, is unnatural and unmeet.

By these statutes and others (*i*), as well all merchant strangers as denizens, have liberty granted to them to bring their wares into England, and to sell the same in grosse, or by retail; notwithstanding any patent priviledge or custom to the contrary: therefore this monopoly patent to restrain, or take away that from the subjects being merchants, which was\* given unto them by Parliament is not good in Law for it is not like the case where the King may dispense with *malum prohibitum* and there it is said (*k*) That such a charter is hurtful to the King and to his people.

\* Noy, 182.

And the statute of 26 *H.* 8. *cap.* 10. doth give power to the King during his life to restrain or set at liberty traffick beyond the seas for certain countries, which act had been an idle and vain act, if the King by Letters Patents might have done so much without act. And the writ of *Ne exeat regnum* was never granted generally against all merchants but against particular persons for particular causes; for if partial affection by private discretion do govern publique affairs, there one man's will (*l*) becometh every man's misery.

It is a ground in law that the King by his patent cannot do wrong as to make discount. (*m*) &c. and that his prerogative is no warrant to injury any subject (*n*).

And sith the law is clear that if the King grant my lands or goods, the grant is void and unlawfull I see no reason when the King cannot grant away 22 *d.* which I have gotten by my trade that he should grant away my trade whereby I got that 22 *d.* and maintained my wife and children.

That this is a monopoly Patent it appeareth by the description or definition set forth by Mr. Solicitor, which is thus. It is a monopoly *cum penes vestrum potestas vendendi fit*. But when there be many sellers, although they be all free of one Company;

(*i*) 9 E. 3, cap. 1; 25 E. 3, cap. 2.

(*k*) 25 E. 3, cap. 2.

(*l*) *Sic.*; *sed qu.* weal.

(*m*) "Discount." presumably means discontinuance, signifying

that although the King can grant a protection by patent, the protection can only delay a suit (continuance) and cannot make it discontinue.

(*n*) *Case de Alton Woods*, fo. 44.



as Goldsmiths, Clothiers, Merchants, Drapers, Taylors, Shoemakers, Tanners and such like, who have settled governments and Wardens and Governours to keep them in order they were never accompted a Monopoly; which the statute of *Anno 5 Eliz. (o)* in some sort proveth because in many of these trades all persons are prohibited to use the same but only such as have served in the same trade seven years as an apprentice. But if they, or any other like society, should conspire together to inhaunce the prices of their wares or of their labours it is a thing punishable by the common laws, presentable in every Court and to be censured severely in the Star-chamber. But in this patent the sole and whole traffick for the making, buying and selling of cards throughout the Realm is given to Mr. *Darcy* and his assigns for twenty one years; which is a plain Monopoly Patent.

Fuller's argument.

Now therefore I will shew you how the Judges have heretofore allowed of monopoly patents which is that where any man by his own charge and industry or by his own wit or invention doth bring any new trade into the Realm or any Engine tending to the furtherance of a trade that never was used before and that for the good of the Realm; that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his Invention to the Commonwealth; otherwise not (*p*).

See above, p. 194.

(*o*) 5 Eliz. c. 4, s. 24.

(*p*) This celebrated passage is the one now quoted in all the books, both British and American, as having been the judgment of the Court. But although this impression is wholly without foundation, for the Court did in point of fact forbear to decide, and even to consider, the question as to what is good subject-matter of a patent grant, yet the dictum is not without judicial authority. It was cited and adopted in *Crane v. Price and others* (1 W. P. C. 411), by Tindal, C. J., who extracted the sentence beginning with the words "where any man," and ending with "reasonable time," in delivering the judgment of the Court, and made it the criterion by which the issue of subject-matter in that case was tried. No doubt Sir Nicolas Tindal thought that he was founding on an earlier judg-

ment, and was misled by Noy. This was in 1842. Two years later Webster's Patent Cases appeared, in which an extract from Noy's report comprising this passage appears and is put forward without explanation as if it were taken from a judgment. Possibly Webster, who cannot conceivably have overlooked the fact that this was from a speech by counsel, relied upon the citation of the dictum by the L. C. J. of his day. Whatever the explanation, it is certain that Webster's voucher has led later writers to take the passage without question for an authority, until they have so consecrated it by acceptance that it would have to be recognized as authoritative now, even if it could not, as in connection with the decision of *Crane v. Price*, be provided with a judicial sponsor.

Fuller's argument.

\* Noy, 183.

Hasting's Patent.

In the 9th *Eliz.* there was a Patent granted to Mr. *Hastings* of the Court. That in consideration that he brought in the skill of making of frisadoes as they were made in *Harlem* and *Amsterdam* beyond the seas,\* being not used in *England* that therefore he should have the sole trade of the making and selling thereof for divers years charging all other subjects not to make any frisadoes in *England* during that time upon pain to forfeit the same frisadoes by them made and to forfeit also 100*l.* the one moyety thereof to the Queens Majestie the other to Mr. *Hastings*. Upon which Patent Mr. *Hastings* about 20 years past exhibited an information in the Exchequer against certain clothiers of *Corsall* for making of frisadoes, contrary to the intent of this patent. To which information, for that it was against law to have such penalties of the goods, and 100*l.* to be forfeited by force of a letter patent; therefore did demur upon the information, and moved the Court, and the opinion of the Court being clear against him, he never went further in his information but exhibited his English bill in the Exchequer chamber against them where, upon the examination of the cause, it appeared that the same clothiers did make baies very like to Mr. *Hastings* frisadowes and that they used to make them before Mr. *Hastings* patent; for which cause they were neither punished nor restrained from making their baies like to his frisadoes.

Matthey's Patent.

Another monopoly patent was granted to Mr. *Matthey* a cutler at Fleetbridge in the beginning of this Queens time, which I have here in Court to shew, by which patent it was granted unto him the sole making of knives with bone hafts and plates of lattin because, as the Patent suggested, he brought the first use thereof from beyond seas; yet, nevertheless, when the wardens of the Company of Cutlers did shew before some of the Counsel and some learned in the law that they did use to make knives before, though not with such hafts, that such a light difference or invention should be no cause to restrain them, whereupon he could never have benefit of this patent although he laboured very greatly therein.

Humphrey's Patent.

Lastly the monopoly patent granted to one *Humphrey* of the Tower, for the sole and only use of a sive or instrument for melting of lead, supposing that it was of his own invention and therefore prohibited all others to use the same for a time. And because others used the like instrument in Darbyshire, contrary to the intent of his Patent, therefore he did sue them in the Exchequer Chamber by English bill. In which Court the question was whether it was newly invented by him whereby he might have the sole privilege or else used before at *Mendiff* in the West Country; which,

if it were there before used, then the Court was of opinion he should not have the sole use thereof.

In Easter term last, in the Kings Bench, *Gowby* (q) Custom of Canterbury. brought an action of trespass against *Knight* for false imprisonment. *Knight* justified because of the Mayor and Citizens of *Cant.* have used time of mind to nominate a town chandler within *Cant.* and that all the butchers within *Canter.* should sell their tallow to him at such a price as the Mayor should appoint or else to be committed. And that because the Plaintiff was a butcher in the town and refused to sell his tallow to the town chandler, was committed and so justified &c. Whereupon the Court was moved this term that the issue concerning the custom might be tried out of *Cant.* And the Court then thought that the custom was not good, but unreasonable and unlawful, because it did tend to a Monopoly. Wherefore the Plaintiff did demur upon the same plea.

\* Now touching the action of the Case grounded upon the \* Noy, 184. Monopoly Patent.

There is no wrong done to the Plaintiff by the Defendant selling of cards better cheap than the Plaintiff would though he received losse and therefore no cause of action, like unto the case of 11 H. 4. f. 47. where there was a school of long continuance and another had erected a new school in the same town whereby the school-master of the ancient school gained not so much as he did before yet he could have no action against the new school-master for the same. And Mr. *Darcies* case is much stronger against him for that he, newly intruding into the trade of making & selling of cards, doth bring his action against the ancient card-seller for hindring his sale; which is all one as if the new school-master should bring his action against the old school-master for teaching so well that he cannot gain so much by teaching his scholars as he desired; which the law will not allow, being *damnum absque injuria*, as in this Case. Right of competition.

A Man hath a mill in a Town of ancient continuance and another buildeth a mill in the same Town whereby some of his customers doth forsake the ancient mill; this is no wrong though it be damage and therefore no cause of action, and then also I compare that to this case (r).

*I. S.* hath a pasture in the town of *Dale* where the tenants do use sometimes to put their cattel to jost and another person in the same town doth recover grounds overflown with water and doth make that good pasture where the tenants have cattel better cheap to the damage of *I. S.* &

(q) Moore calls the plaintiff Ruby K. B. 674.  
and the defendant Wright. Moore, (r) 22 H. 6, fo. 14.

yet no cause of action, being neither wrong to *I. S.* nor hurt to the Common-wealth.

The Case was this; *B.* said unto *R.* that *I. S.* said that if he did meet *R.* he would kill him; whereupon *R.* for fear of *I. S.* fled so fast that he killed his horse. This was damage to him and yet he had no cause of action. So in our Case although the antient cardseller do sell better cheap than Mr. *Darcy*, yet it is no wrong to him nor to the common-wealth; so no cause of Action.

Now to answer the Cases and matters material to be answered.

It is first objected that it is unlawfull and hurtfull the playing at cards in all parts of the Realms and therefore restrainable by patent in all parts of the Realm.

I answer that moderate playing at cards was never thought unlawfull or prohibited generally but for servants and in some particular manner for some persons; which, by the intent of the same laws (*q*), must be thought lawfull for the persons not thereby prohibited. And Mr. *Darcy* in his declaration saith that he made 4000 grosse of cards for the necessary use of subjects &c. which necessary use cannot be of a thing hurtful.

\* Noy, 185.

This Patent is no restraint of Card-playing but rather an occasion\* of increase of play, as I can prove plainly, as it is now used and doth but take the trade of making and selling of Cards from many persons and giveth that trade to one; which is unlawful.

Where it is objected, that an action of case was maintainable for money won by false dice this maketh rather against the Plaintiff than with him for that if it had been won by true dice it had been so lawfully done that the party had had no remedy.

Where they object a writ in the Register, rehearsing of a grant made to the Abbot of Westminster, that he should have a fair to continue 32 dayes at Westminster and that none during that time should buy or sell any Merchandise within seven miles of the fair, to this I answer, that upon this writ there was never judgement or allowance given in any Court and that it is unreasonable and absurd that none should buy or sell within seven miles whatsoever occasion should happen; as many times men are robbed of their apparel and then they must go seven miles to buy new, or goe naked. And there be divers writs in the Register which have no warrant of law, as action of waste against Tenant for life, when there is a mean remainder for life between. And likewise an action of wast by the heir for wast done in the time of the father.

(*q*) 12 R. 2, c. 6; 1 H. 4, c. 9 (so in Noy, *sed qu.*); 33 H. 8, c. 9.



Which are against Law and it is a fit answer to vouch against this writ the writ that *Thorninge* saith he hath seen in the Register, *Precepe domino Regi*, which is as absurd as the other though in an other degree; which writs are more meet to be concealed than vouched by such as regard the credit of the Law. But it was adjourned till another day (r).

The Attorney-General *è contra* argued that the King can prohibit or license *mala prohibita* and can restrain matters of pleasure and this for the public good although it may involve damage to private persons. And he cited 22 E. 3, fo. 14 and 29 (s), that trial *per medietate linguæ* was granted first by patent before it was confirmed by Act of Parliament. And 20 E. 3, *titulo* Corone, the King granted to Londoners that they should not join battle (t). The Register (u) has a case where one made default after default, and was about to lose his land to the demandant but the King granted *warrantia diei* by which he was privileged and the demandant prejudiced. 30 H. 6, fo. 25, and 5 E. 2, *titulo* Quare Impedit, 125 (x). The King can make a County Palatine and thereby the subject will be restricted to sue there for justice and will\* be shut out from other Courts. The King can grant a protection to delay suits and (1 H. 7 (y)) he

Moore, K. B. 674.  
The Attorney-General's argument.

\* Moore, K. B. 675.

(r) Moore gives the following passage from Fuller's speech (Moore, K. B. 674), and see above, p. 217.

Fuller who argued *è contra* insisted upon the liberty of subjects in the use of their trade which he thought could not be tolled or restrained by the king's patent. And he cited 2 H. 5, fo. [probably the *Case of John the Dyer*, Y. B. 2 H. 5, fo. 5, pl. 26. See above, p. 217], the case of a dyer, and 14 H. 8 that a millstone is not distrainable nor a smith's anvil nor the garment in a tailor's shop nor a horse in a common hostelry because in the public interest such trades are not to be interrupted or restrained [the case referred to is *Wiston v. Abbot of St. Alban's*, Y. B. 2 H. 8, fo. 25, pl. 6 (Easter Term). Only the millstone was adjudicated upon. The smith's anvil is mentioned with a "qu.," the garment and the horse are quoted from 22 E. 4, 49].

(s) The reference in fo. 14 is to pl. 38, which is to the effect stated

in the text. The reference to fo. 29 appears to be wholly mistaken.

(t) The exemption of Londoners from wager of battle is traced by Coke in 4 Inst. 252, to a charter of H. 3, dated 16th March, 1227. The Year Book for 20 E. 3 is lost.

(u) *Registrum Brevium*. There are several precedents of the king's *warrantia diei* in the Register, pp. 18 and 19, but they do not show that the party warranted had made repeated defaults of appearance. Coke may have been supplying the facts *ab extra*.

(x) These references seem both to be incorrect. I can make nothing of them.

(y) This incomplete reference may perhaps relate to the *Case of Humfrey Stafford* attainted of high treason, and arrested at Culnam, a sanctuary of the Abbots of Abingdon. The plea of sanctuary did not avail him, but it seems to have been conceded that the King could at one time have granted a sanctuary for treason, perhaps *à for-*



Coke's argument.

can grant sanctuary for debt. And with respect to the statute of 32 E. 3 (*y*), although the sea be open to everybody for traffic yet the King can issue an injunction *ne exeas regnum*, as says Fitz. Nat. Bre. and Dyer, 1 Mariæ (*z*). And he said that the King has divers prerogatives indisputable by the subject, as 21 E. 3, 60 (*a*), to make leagues, to debase the coin, levy forces, &c. And 3 E. 1 *rot. patentium* (*b*) in the Tower E. 1 restrained the transportation of wool, and it was good. And the office of Aulneger was granted 17 E. 2, and adjudged good without Parliament, and the King has impost and *magna custuma* by the common law, see 30 H. 8, and 1 Mar. Dyer, fo. 92 (*c*). And 2 E. 3, fo. 7 (*d*), a patent granted that all ships laden in the haven of Yarmouth should there discharge and not elsewhere. And 5 E. 3, fo. 47, and 6 E. 3, fo. 10 and 51, a grant of the first taste of all wines which come to certain parts (*e*). And 32 E. 3, in the records

*lori*, as stated in the text, for debt. Y. B. 1 H. 7, fo. 22, pl. 15 (Easter Term). But this identification of Coke's authority is not very satisfactory.

(*y*) A manifest error. Perhaps 9 E. 3, c. 1 is meant. See above, p. 218, and below, p. 230.

(*z*) The reference to Dyer appears to be mistaken, but it may with some probability be corrected into Dyer, 1 Eliz. fo. 165, where the law is laid down to the effect that no subject may go beyond the sea without a royal licence. There is a vague reference here to Fitzherbert's *Natura Brevium*, which is repeated and made more precise in a later case in Dyer relating to the same point of law. Dyer, 13 Eliz. 296. There the reference is to Na. Bre. 85, which has been copied into Moore's text above. The writ as given in Fitzherbert is *writ de securitate invenienda quod se non divertat ad partes externas sine licentia Regis*. See also Ry. 17 Fœd. 277.

(*a*) This reference to the Year Book of Edw. III. does not seem to relate to the prerogative of making leagues. Coke may possibly have cited the case of *The King v. The Bishop of Norwich*, which appears in the place mentioned, and where the king prohibited the elected bishop from entering upon the enjoyment of

his temporalities by way of bringing him to a recognition of the prerogative.

(*b*) The reference is, apparently, to a patent appearing on the first membrane of the Patent Roll for this year, entitled "*De nova Custuma lanarum, &c. Regi Concess. n. 1.*"

(*c*) I cannot perfect the reference to 30 H. 8. The case in Dyer is the case of a merchant alien who had compounded for all such customs, subsidies, and other burdens of whatever kind upon his merchandize, to the extent to which it would be chargeable in the hands of an English merchant. The prerogative was evidently taken for granted in this arrangement, and is not more explicitly asserted in the discussion of the continuing validity of this grant. The question agitated was whether it was avoided by the death of the grantor king.

(*d*) A mistaken reference which I am unable to correct.

(*e*) The material reference here is 6 E. 3, fo. 51. The first citation appears to be a mistake. The second refers to pl. 28 in the Hil. Term of 6 E. 3, in which the case of *Rex v. The Archbishop of Everwike*, a *quo warranto*, is reported. But that report deals only with what we should now call an interlocutory proceeding. The Archbishop's

of the Tower the King granted to Fulco—a stranger born, who was the first apothecary in London—that he should be a denizen and freeman of London; they of London refused upon the King's letters to accept him but in the end were compelled so to do. The Statute of R. 2 (*f*) provides that the King shall make no impositions but by Parliament, yet 13 H. 4 (*g*) adjudged that he can charge the subjects for musters or guard of castles in time of war. 28 H. 6, in the Rolls of the Tower the King grants to the Earl of Warwick, being a puisne Baron, that he should be the uppermost in Parliament and should have a ring of gold. 1 E. 4, a patent grants to one to have a penny for the sealing of certain vessels, and it was good. So a patent for the garbling of spices was made 33 H. 8 and continues to this day (*h*) and the patent for printing also is in privilege to this day because they are for the public good (*i*). And the customs and bye-laws of cities, boroughs and corporations are allowed although contrary to common right and the liberty of the subject. And to show that the King can restrain matters of pleasure he cited 3 E. 2, Broke, Forests (*k*); he can restrain any man from making a park, forest or chase. And 30 E. 3 (*l*), in the Parliament Rolls is a precedent that whereas the alchemists in the time of H. 6 (*l*) persuaded the King that a philosopher's stone could be made and the King in consequence granted a commission to two friars and two aldermen to inquire if it were feasible, who made a return that it was. Therefore the King granted to those aldermen a patent of

Coke's argument.

Prerogative.

case is stated on fo. 51 as above cited, and from that it appears that he claimed by prescription the first taste and pre-emption of wines in the port of Eawe de Hull after the King's prisal.

(*f*) 11 R. 2, ch. 9.

(*g*) I cannot find any such authority.

(*h*) I have not been able to discover this original patent for the garbling of spices. A patent founded in part upon it for the garbling of tobacco is given in Ry. 17 Feod. 191.

(*i*) This refers no doubt to the Charter of the Stationers' Company. Possibly also to the privileges of the Universities. See *Stationers' Co. v. Carnan*, 2 Wm. Bl. 1003; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.

(*k*) This is a mistake on the part of the reporter. The correct refer-

ence is given in Coke's Synopsis of the Argument, and is to Brooke's Ab., tit. Action on the Statute, pl. 48. The imperfect reference 3 E. 2, is evidently founded on Brooke, who gives as his authority "Note on Circuit in the time of E. 2." See above, p. 202.

(*l*) Whether Edward III. or Henry VI. is to be credited with having patented the philosopher's stone must be left to the industry of some future student to determine. Hindmarch, citing this passage, sets it down to Edward, but assigns no reason for his choice. The Parliament Roll affords no help, for the Parliament did not assemble in the 30th year of the third Edward's reign, and therefore there is no such Roll. But possibly the Patent Roll is meant. See Coke's Synopsis of the Argument, above, p. 202.

privilege that they alone and their assigns should make the philosopher's stone. And he concluded that cards were matter of pleasure and could be restrained by patent. And *postea Pasch.* 1 Jac. it was adjudged *pro defendente*.

11 Co. Rep.  
86.  
Judgment.

As to the first (*l*), it was argued to the contrary by the defendant's counsel and resolved by Popham Chief Justice & *per totam curiam* that the said grant to the plaintiff of the sole making of cards within the realm was utterly void and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers acts of Parliament. Against the common law for four reasons:

Freedom of  
trade by com-  
mon law.

1. All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject; and therewith agrees Fortescue in *Laudibus legum Anglie*, cap. 26 (*m*). And a case was adjudged in this court in an action of trespass *inter Davenant and Hurdis*, Trin. 41 Eliz. Rot. 92 (*n*), where the case was that the company of Merchant Taylors in London, having power by charter to make ordinances for the better rule and government of the company, so that they are consonant to law and reason, made an ordinance that every brother of the same society who should put any cloth to be dressed by any clothworker, not being a brother of the same society, shall put one half of his cloths to some brother of the same society who exercised the art of a clothworker, upon pain of forfeiting ten shillings &c. and to distrain for it &c. and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases and cannot be restrained to certain persons for

(*l*) *I.e.*, the first question formulated in Coke's Epitome of the Argument—the question, namely, of the validity of the grant of sole making within the realm; the second question being of the va-

lidity of the exclusive dispensation giving the plaintiff the right of sole importation. See above, p. 201.

(*m*) This reference to Fortescue appears to be mistaken.

(*n*) Moore, K. B. 576.

that in effect would be a monopoly; and therefore such Judgment.  
ordinance, by colour of a charter, or any grant by charter to such effect, would be void.

2. The sole trade of any mechanical artifice, or any other Mischief of monopoly, is not only a damage and prejudice to those that exercise the same trade but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions are added to moderate them, yet *res profecto stulta est nequitie modus*, it is mere folly to think that there is any measure in mischief or wickedness and therefore there are three inseparable incidents to every monopoly against the commonwealth, *sc.*  
1. That the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases: and this word *monopolium*, *dicitur από τοῦ μόνου καὶ πωλεῖν quod est cum unus solus aliquod genus mercaturæ universum emit pretium ad suum libitum statuens.* And the poet saith: *omnia Castor emit, sic fit ut omnia vendat.* And it appears by the writ of *Ad quod damnum*, F. N. B. 222 a (o), that every gift or grant from the King has this condition, either expressly or tacitly annexed to it, *Ita quod patria per donationem illam magis solito non oneretur seu gravetur (p)* and therefore every grant made in grievance or prejudice of the subjects is void (q); and 13 H. 4, 14 b, the King's grant which tends to the charge and prejudice of the subject is void (r).

(o) Fitzherbert's *Natura Bre-vium*. The writ *ad quod damnum* was issued when a suitor applied for a grant of the royal bounty, or a licence to make a grant in mortmain, and directed the escheator to inquire whether any, and if any who, would be damnified by the proposed grant.

(p) This clause is extracted from the writ *ad quod damnum*, and expresses the end of the inquiry directed to be made by the escheator. The words do not, of course, occur in the grant made upon the escheator's return and the argument seems to be therefore that if the effect of the grant is to lay a burden or a grievance on the subject, the King must have been deceived by the escheator's return.

(q) It is, perhaps, worthy of remark, that the avoidance accord-

ing to this theory arises not because the gift is *ultra vires*, but because it is *contra intentionem* of the King. The judges were far from adopting Fuller's doctrine that the King cannot make a grievous grant (above, p. 218). They refrained from putting a limit on the prerogative, and only decided that the Crown never intended a grievous grant, and that as its grants always take effect "*secundum intentionem regis*" (see above, p. 113) to prove it grievous is to prove it void. It is one of those ingenious developments of the courtly doctrine that the King can do no wrong, in which the English common lawyers so greatly delighted, and by which they so effectively served the cause of liberty.

(r) See above, p. 212.



Judgment.

The 2d incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the commonwealth.

Mischief of monopoly.

3. It tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary: *Vide Fortescue ubi supra (p)*: and the common law, in this point, agrees with the equity of the law of God, as appears in Deut. cap. xxiv. ver. 6.\* *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi*; you shall not take in pledge the nether and upper millstone, for that is his life; by which it appears, that every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life: and it agrees also with the civil law; *Apud Justinianum enim legimus, monopolia non esse intromittenda quoniam non ad commodum reipublice sed ad labem detrimentaque pertinent. "Monopolia interdixerunt leges civiles, cap. De Monopoliis lege unica."* Zeno imperator statuit, ut exercentes monopolia bonis omnibus spoliarentur. Adjecit Zeno, ipsa rescripta imperialia non esse audienda, si cuiquam monopolia concedant (q).

\* 11 Co. Rep. 87.

Queen deceived in grant.

3. The Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be encreased for the private benefit of the patentee, and therefore as it is said in 21 E. 3. 47 in the Earl of Kent's case, this grant is void *jure Regio*.

Grant without precedent.

4. This grant is *primæ impressionis*, for no such was ever seen to pass by letters patent under the great seal before these days, and therefore it is a dangerous innovation as well without any precedent or example as without authority of law, or reason. And it was observed that this grant to the plaintiff was for twelve years (r) so that his executors, ad-

(p) Above, p. 226.

(q) Cod. Just. lib. IV. tit. 59, De Monopoliis.

(r) This should be *twenty-one* years. See above, p. 200. There

had been a grant of the same privilege formerly made to Ralph Bowen and this is probably the source of the mistake.



ministrators, wife or children, or others inexpert in the art and trade, will have this monopoly. And it cannot be intended that Edward Darcy, an Esquire and a groom of the Queen's Privy Chamber, has any skill in this mechanical trade of making cards. And then it was said that the patent made to him was void; for to forbid others to make cards who have the art and skill and to give him the sole making of them who has no skill to make them will make the patent utterly void. *Vide* 9 E. 4. 5. b. And although the grant extends to his deputies, and it may be said he may appoint deputies who are expert, yet if the grantee himself is not expert and the grant is void as to him, he cannot make any deputy to supply his place, *quia quod per me non possum, nec per alium*. And as to what has been said, that playing at cards is a vanity, it is true, if it is abused, but the making of them is neither a vanity nor a pleasure, but labour and pains. And it is true, that none can make a park, chase or warren without the King's licence, for that is *quodam modo* to appropriate those creatures which are *feræ nature*, & *nullius in bonis* to himself, and to restrain them of their natural liberty, which he cannot do without the King's licence; but for hawking, hunting, &c. which are matters of pastime, pleasure, and recreation, there needs no licence, but every one may, in his own land, use them at his pleasure without any restraint to be made, unless by Parliament, as appears by the statutes of 11 H. 7. c. 17. 23 Eliz. c. 10. 3 *Jac. Regis* c. 13 (s). And it is evident by the preamble of the said Act of 3 E. 4. c. 4. (t) that the importation of foreign cards was prohibited at the grievous complaint of the poor artificers cardmakers, who were not able to live of their trades if foreign cards should be imported, as appears by the preamble, by which it appears, that the said act provides remedy for the maintenance of the said trade of making cards forasmuch as it maintained divers families by their labour and industry; and the like act is made in 1 R. 3. chap. 12.

And therefore it was resolved, that the Queen could not suppress the making of cards within the realm no more than

Judgment.

Prerogative.

Conclusion.

(s) These three statutes are game laws. It is evident from the last reference that Coke himself edited this judgment, and permitted himself to exercise a large discretion in doing so, for as the judgment was

delivered within a few weeks of James' accession to the throne, the citation of an Act of the third year of his reign is a manifest anachronism.

(t) See above, p. 207, n. (a).

Judgment.	the making of dice, bowls, balls, hawks hoods, bells, lures, dog couples and other the like, which are works of labour and art although they serve for pleasure, recreation and pastime and cannot be suppressed but by Parliament, nor a man restrained from exercising any trade, but by Parliament, 37 E. 3. cap. 16 ( <i>u</i> ), 5 Eliz. cap. 4 ( <i>x</i> ). And the playing at dice and cards is not prohibited by the common law, as appears Mic. 3 & 9 El. Dyer 254 ( <i>y</i> ) (unless a man is deceived by false dice or cards, for then he who is deceived, shall have an action upon his case for the deceit) and therefore playing at cards, dice, &c. is not <i>malum in se</i> , for then the Queen could not tolerate nor license it to be done. And where King E. 3 in the 39th year of his reign, by his proclamation, commanded the exercise of archery and artillery, and prohibited the exercise of casting of stones and bars, and the hand and foot-balls, cock-fighting, & <i>alios ludos vanos</i> , as appears <i>in dors' claus' de an.</i> 39 E. 3. nu. 23. yet no effect thereof followed, until divers of them were prohibited upon a penalty, by divers acts of Parliament, <i>viz.</i> 12 R. 2. cap. 6. 11 H. 4. cap. 4. 17 E. 4. cap. 3. 33 H. 8. c. 9.
Freedom of trade.	
Power of Parliament.	
Force of Act of Parliament	Also such charter of a monopoly, against the freedom of trade and traffic, is against divers acts of Parliament, <i>sc.</i> 9 E. 3. c. 1 & 2, which for the advancement of the freedom of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage, or custom, or judgment given upon such charters, which charters are adjudged by the same Parliament to be of no force or effect, and made to the derogation of the Prelates, Earls, Barons and grandes of the realm, and to the oppression of the commons. And by the statute of 25 E. 3. cap. 2. ( <i>z</i> ) it is enacted, that the said act of 9 E. 3. shall be observed, holden, and maintained in all points. And it is further by the same act provided, that if any statute, charter, letters patent, proclamation, command, usage, allowance, or judgment be made to the contrary, that it shall be utterly void, <i>Vide Magna Charta</i> , cap. 18. 27 E. 3. cap. 11, &c. ( <i>a</i> ).
11 Co. Rep. 88.	

(*u*) The reference here to the chapter is mistaken. Probably Chapter I. is intended. That is a statute regulating the trade in wool.

(*x*) The statute about artificers and apprentices, 5 Eliz. c. 4, s. 24.

(*y*) This reference to Dyer ap-

pears to be mistaken. But Fitzherbert's Nat. Bre. 95 may be cited to support the text. See also *Harris v. Bowden*, 1 Cro. Eliz. 90.

(*z*) *I.e.* 25 E. 3, st. 4, cap. 2.

(*a*) These statutes accord freedom of trade to merchants.

As to the 2d question it was resolved, that the dispensation or licence to have the sole importation and merchandizing of cards (without any limitation or stint) notwithstanding the said act of 3 E. 4. (*b*) is utterly against law (*c*): for it is true, that forasmuch as an act of Parliament which generally prohibits a thing upon a penalty, which is popular, or only given to the King, may be inconvenient to divers particular persons in respect of person, place, time &c. for this reason the law has given power to the King to dispense with particular persons (*d*); *dispensatio mali prohibiti est de jure domino Regi concessa, propter impossibilitat' præviden' de omnibus particular'*, & *dispensatio est mali prohib' provida relaxatio, seu necessitate pensata*. But when the wisdom of the Parliament has made an act to restrain *pro bono publico* the importation of many foreign manufactures, to the intent that the subjects of the realm might apply themselves to the making of the said manufactures &c. and thereby maintain themselves and their families with the labour of their hands, now for a private gain to grant the sole importation of them to one or divers (without any limitation), notwithstanding the said act, is a monopoly against the common law and against the end and scope of the said act itself; for this is not to maintain and increase the labours of the poor card-makers within the realm, at whose petition the act was made, but utterly to take away and destroy their trade and labours and that without any reason of necessity or inconvenience in respect of person, place, or time; and *eo potius* because it was granted in reversion for years, as hath been said, but only for the benefit of a private man, his executors and administrators, for his particular commodity and in prejudice of the commonwealth. And King E. 3. by his letters patent granted to one John Peché the sole importation of sweet wine into London, and at a Parliament held 50 E. 3. this grant was adjudged void, as appears in Rot. Parl. an. 50 E. 3. M. 33. (*e*). Also admitting that such grant or dispensation was good, yet the plaintiff cannot maintain an action on the case against those who import any foreign cards, but the remedy which the act

Judgment.

Dispensation.

Dispensing power.

Act of Parliament *pro bono publico*.

Action upon a statute.

(*b*) 3 E. 4, ch. 4.

(*c*) The doctrine of the dispensing power is now completely obsolete, the power itself having been abolished by 1 Wm. & Mar. c. 1.

(*d*) "Dispense with . . . persons." As to this idiom, see above, p. 34.

(*e*) It has been pointed out above that the Parliament Roll does not at all sustain this view of Peché's patent. See p. 206, n. (*r*).

(*f*) *I.e.*, forfeiture of the goods imported in breach of the statute one-half to the King, and the other half to him who will first seize them for the King. 3 E. 4, c. 4.

Judgment.  
Decision.

of 3 E. 4. in such case gives ought to be pursued (*f*). And judgment was given and entered, *quod querens nihil caperet per billam*.

To this report Sir Edward Coke subjoins the following characteristic comment:—

“And *nota* reader, and well observe, the glorious preamble and pretence of this odious monopoly. And it is true *quod privilegia quæ re vera sunt in prejudicium reipublicæ, magis tamen speciosa habent frontispicia & boni publici prætextum quam bonæ & legales concessionēs; sed prætexu liciti non debet admitti illicitum*. And our lord the King that now is, in a book which he in zeal to the law and justice commanded to be printed *anno* 1610, intituled, ‘A Declaration of his Majesty’s Pleasure, &c.,’ p. 13, has published, that monopolies are things against the laws of this realm; and therefore expressly commands that no suitor presume to move him to grant any of them, &c.”

## II.—THE CASE OF PENAL STATUTES.

*Hil. Term* 1605.

7 Co. Rep.  
36.

Grant of  
dispensing  
power.

This term upon letters directed to the Judges to have their resolution concerning the validity of a grant made by Queen Elizabeth, under the great seal, of the penalty and benefit of a penal statute, with power to dispense with the said statute, and to make a warrant to the Lord Chancellor, or Keeper of the great seal, to make as many dispensations, and to whom he pleased; and on great consideration and deliberation by all the Judges of England, it was resolved, that the said grant was utterly against law. And in this case these points were resolved, that when a statute is made by Parliament for the good of the commonwealth, the King cannot give the penalty, benefit, and dispensation of such act to any subject; or give power to any subject to dispense with it, and to make a warrant to the great seal for licences in such case to be made: for when a statute is made *pro bono publico*, and the King (as the head of the commonwealth, and the fountain of justice and mercy) is by the whole realm trusted with it, this confidence and trust is so inseparably joined and annexed to the royal person of the King in so high a point of sovereignty, that he cannot transfer it to the disposition or power of any private person, or to any private use; for it

Incommu-  
nicable pre-  
rogative.



was committed to the King by all his subjects for the good of the commonwealth. And if he may grant the penalty of one act, he may grant the penalty of two, and so *in infinitum*. And such grant of any penal law was never seen in our books, nor before this age was any such grant ever made; but it is true, that the King may (upon some cause moving him in respect of time, place, or person, &c.) make a *non obstante* \* to dispense with any particular person, that he shall not incur the penalty of the stat. and therewith agree our books. But the King cannot commit the sword of his justice, or the oil of his mercy concerning any penal statute to any subject, as is aforesaid. It was also resolved, that the penalty of an act of Parliament cannot be levied by any grant of the King, but only according to the purpose (a) and purview of the act; for the act which gives the penalty ought to be followed only in the prosecution and levying thereof; and great inconveniences would thereon follow, if penal laws should be transferred to subjects. 1. Justice thereby would be scandalized; for when such forfeitures are granted, or promised to be granted before they are recovered, it is the cause of a more violent and undue proceeding. 2. When it is publicly known that the forfeiture and penalty of the act is granted, it is a great cause that the act itself is not executed; for the Judge and Jurors, and every other is thereby discouraged. 3. It will thereupon follow, that no penalty will by any act of Parliament be given to the King, but limited to such uses with which the King cannot dispense. And hereupon divers who had sued to have the benefit of certain penal laws, were upon this resolution denied. And the certificate of all the Judges of England concerning such grants of penal laws, and statutes, was in these words (b). "May it please your Lordships, we have (as we are required by your honourable letters of the 21st of Octob. last) conferred and considered among ourselves (calling to us his Majesty's counsel learned) of such matters as were thereby referred unto us, and have thereupon with one consent resolved for law and conveniency as followeth. 1st, That the prosecution and execution of any penal statute cannot be granted to any, for that the act being made by the policy and wisdom of the parliament for the general good of the whole realm, and of trust committed to the King as to the head of justice and of the weal public, the same cannot by law be transferred over to any subject; neither can any penal statute be prosecuted or executed by his

Dispensing power.

\* 7 Co. Rep. 37.

Action on statute.

Mischief of grants of penalties.

Certificate of Judges.

Grants of penalties.

(a) Qu. "purport."

(b) This letter of the Judges was drawn up, apparently, in English,

and is not therefore—like the report—a translation from an original expressed in Law French.



“ Majesty’s grant, in other manner or order of proceeding,  
 “ than by the act itself is provided and prescribed : neither  
 “ do we find any such grants to any in former ages : and of  
 “ late years, upon doubt conceived, that penal laws might be  
 “ sought to be granted over, some Parliaments have forborn  
 “ to give forfeitures to the crown, and have disposed thereof  
 “ to the relief of the poor, and other charitable uses, which  
 “ cannot be granted or employed otherwise. We are also of  
 “ opinion, that it is inconvenient, that the forfeitures upon  
 “ penal laws, or others of like nature, should be granted to  
 “ any, before the same be recovered or vested in his Majesty  
 “ by due and lawful proceeding ; for that in our experience  
 “ it maketh the more violent and undue proceeding against  
 “ the subject, to the scandal of justice, and the offence of many.  
 “ But if by the industry or diligence of any, there accrueth  
 “ any benefit to his Majesty, after the recovery, such have  
 “ been rewarded out of the same at the King’s good pleasure,  
 “ &c. Dated 8 Novemb. 1604.” And to this letter all the  
 Judges of England set their hands.

Mischief of  
 grants of  
 penalties.

7 Co. Rep.  
 37.

Rewards.

## APPENDIX III.

	PAGE
1. STATUTE OF MONOPOLIES (21 Ja. 1, c. 3) .....	235
2. SELECTED PASSAGES FROM THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (46 & 47 Vict. c. 57, ss. 22, part of 26, 29, 30, 31, 32, part of 33, 46, 84, part of 117, and Sched. I. Form D.) .....	242
3. PATENTS RULES, 1890, relating to proceedings upon a Petition to the Board of Trade for an Order under the 22nd section of the Patents Act .....	247



## I.—STATUTE OF MONOPOLIES.

(21 Ja. 1, c. 3. A.D. 1623-4.)

*An Act concerning Monopolies and Dispensations with penall  
Lawes and the Forfeiture thereof.*

Forasmuch as your most excellent Majestie in your royall judg-  
ment and of your blessed disposicion to the weale and quiet of your  
subjects, did, in the yeare of our Lord God one thousand six  
hundred and ten, publish in print to the whole Realme and to all  
posteritie, that all graunts of monapolyes (*a*) and of the benefitt of  
any penall lawes, or of power to dispence with the lawe, or to com-  
pound for the forfeiture, are contrary to your Majesties lawes,  
which your Majesties declaracion is truly consonant and agreeable  
to the auncient and fundamentall lawes of this your Realme: And  
whereas your Majestie was further graciously pleased expressly to  
commaund that noe suter should presume to move your Majestie  
for matters of that nature; yet nevertheles uppon misinformacions  
and untrue pretences of publique good, many such graunts have  
bene undulie obteyned and unlawfullie putt in execucion, to the  
greate greivance and inconvenience of your Majesties subjects,  
contrary to the lawes of this your Realme, and contrary to your

The King's  
declaration  
against  
monopolies  
and grants  
of penalties  
and dispen-  
sations.

(*a*) Spelt "Monopolies," in the Library of Trinity College, Cam-  
copy to the statute preserved in the bridge.

All mono-  
polies, and  
grants, &c.  
thereof,  
or of dispen-  
sations and  
penalties,  
declared  
void.

Majesties royall and blessed intencion soe published as aforesaid :  
For avoyding whereof and preventinge of the like in tyme to come,  
may it please your most excellent Majestie at the humble suite of  
the lords spirituall and temporall and the commons in this present  
Parliament assembled, that it may be declared and enacted, and be  
it declared and enacted by the authoritie of this present Parliament,  
that all monapolyes (*a*) and all commissions graunts licences char-  
ters and letters patents heretofore made or graunted, or hereafter  
to be made or graunted to any person or persons bodies politique or  
corporate whatsoever of or for the sole buyinge sellinge makinge  
workinge or usinge of any thinge within this Realme or the  
dominion of Wales, or of any other monopolies, or of power libertie  
or facultie to dispence with any others, or to give licence or toler-  
acion to doe use or exercise any thinge against the tenor or purport  
of any lawe or statute, or to give or make any warrant for any  
such dispensacion licence or toleracion to be had or made, or to  
agree or compound with any others for any penaltie or forfeitures  
lymitted by any statute, or of any graunt or promise of the benefitt  
proffitt or commoditie of any forfeiture penaltie or somme of money  
that is or shalbe due by any statute before judgment thereuppon  
had, and all proclamacions inhibicions restraints warrants of assis-  
tance and all other matters and things whatsoever anyway tendinge  
to the institutinge erecting strengtheninge furtheringe or coun-  
tenancinge of the same or any of them, are altogether contrary to  
the lawes of this Realme, and so are and shalbe utterlie void and of  
none effecte, and in noe wise to be putt in ure or execucion.

Validity of  
all monopo-  
lies, and of  
all such  
grants, &c.  
shall be tried  
by the com-  
mon law.

II. And [be it further declared and enacted by the authoritie  
aforesaid that] (*b*) all monopolies and all such commissions graunts  
licences charters letters patents proclamacions inhibicions restraints  
warrants of assistance and all other matters and things tendinge as  
aforesaid, and the force and validitie of them and every of them  
ought to be, and shalbe for ever hereafter examyned heard tryed  
and determined by and accordinge to the common lawes of this  
Realme & not otherwise.

All persons  
disabled to  
use such  
grants,  
monopolies,  
&c.

III. And [be it further enacted by the authoritie aforesaid that] (*b*)  
all person and persons bodies politique and corporate whatsoever,  
which now are or hereafter shalbe, shall stand and be disabled and  
uncapable to have use exercise or putt in ure any monopolie or any  
such commission graunt licence charters letters patents procla-

(*a*) Spelt "Monopolies" in the  
copy to the statute preserved in  
the Library of Trinity College,  
Cambridge.

(*b*) These words within brackets  
[ ] were repealed by the S. L. R.  
Act, 1888 (51 Vict. c. 3, s. 1, Sch.  
Pt. I.).

macion inhibicion restraint warrant of assistance or other matter or thinge tendinge as aforesaid or any libertie power or facultie grounded or pretended to be grounded upon them or any of them.

IV. And [be it further enacted by the authoritie aforesaid that] (c) if any person or persons at any tyme after the end of fortie dayes next after the end of this present session of Parliament shalbe hindred greaved disturbed or disquieted, or his or their goods or chattells any way seised attached distreyned taken carryed away or deteyned by occasion or pretext of any monopolie, or of any such commission graunt licence power libertie facultie letters patents proclamacion inhibicion restraint warrant of assistance or other matter or thinge tendinge as aforesaid, and will sue to be releevd in or for any of the premisses, that then and in every such case the same person and persons shall and may have his and their remedie for the same at the common lawe, by any accion or accions to be grounded uppon this statute, the same accion and accions to be heard and determynd in the Courts of Kings Bench Common Pleas and Exchequer, or in any of them, against him or them by whome he or they shalbe so hindred greaved disturbed or disquieted, or against him or them by whome his or their goods or chattells shalbe soe seised attached distrayned taken carried away or deteyned, wherein all and every such person and persons which shalbe soe hindred greaved disturbed or disquieted, or whose goods or chattells shalbe soe seised attached distrayned taken or carryed away or detayned, shall recover three tymes soe much as the damages which he or they susteyned by means or occasion of beinge soe hindred greaved disturbed or disquieted, or by meanes of havinge his or their goodes or chattells seised attached distrayned taken carried away or deteyned, in (d) double costs; and in such suits, or for the staying or delaying thereof, noe essoine proteccion wager of lawe aydeprayer priviledge injunccion or order of restraint shalbe in any wise prayed graunted admitted or allowed, nor any more than one imperlance; and if any person or persons shall, after notice given that the accion dependinge is grounded uppon this statute, cause or procure any accion at the common lawe grounded uppon this statute to be stayed or delayed before judgement, by coulour or meanes of any order warrant power or authoritie, save onely of the Court wherein such accion as aforesaid shalbe brought and dependinge, or after judgement had uppon such accion, shall cause or

Party aggrieved by any monopoly or grant, &c. shall recover treble damages by action in the Superior Courts with double costs.

Penalty on unduly delaying any such action, &c., præmunire under st. 16 Rich. 2, c. 5.

(c) These words within brackets [ ] were repealed by the S. L. R. Act, 1888 (51 Vict. c. 3, s. 1, Sch. Pt. I.).

(d) The word "in" here is omitted from the copy of the statute preserved in the Library of Trinity College, Cambridge.

procure the execution of or uppon any such judgement to be stayed or delayed by coulour or meanes of any order warrant power or authoritie, save onelie by writt of error or attainit, that then the said person and persons soe offendinge shall incurre and sustaine the paines penalties and forfeitures ordeyned and provided by the Statute of provision and premunire made in the sixteenth yeare of the raigne of King Richarde the Second.

Proviso for  
existing  
patents for  
twenty-one  
years or less,  
for new  
inventions.

[V. Provided nevertheless and be it declared and enacted, that any declaracion before mentioned shall not extend to any letters patents, and graunts of priviledge for the tearme of one-and-twentie yeares or under, heretofore made of the sole workinge or makeinge of any manner of newe manufacture within this Realme, to the first and true inventor or inventors of such manufactures which others att the tyme of makeinge of such letters patents and graunts did not use soe they be not contrary to the lawe nor mischievous to the State by raisinge of the prices of commodities at home, or hurt of trade, or generallie inconvenient, but that the same shalbe of such force as they were or should be if this Act had not bene made and of none other; and if the same were made for more than one and twentie yeares, that then the same for the tearme of one and twentie years onely, to be accompted from the date of the first letters patents and graunts thereof made, shalbe of such force as they were or should have byn yf the same had bene been (c) made but for tearme of one-and-twentie yeares onely, and as if this act had never bene had or made, and of none other.](d).

Proviso for  
future patents  
for fourteen  
years or less,  
for new  
inventions.

VI. Provided alsoe [and be it declared and enacted,](e) that any declaracion before mencioned shall not extend to any letters patents and graunts of privilege for the tearme of fowerteen yeares or under, hereafter to be made of the sole working or makeinge of any manner of new manufactures within this Realme, to the true and first inventor and inventors of such manufactures, which others at the tyme of makeinge such letters patents and graunts shall not use, soe as alsoe they be not contrary to the lawe nor mischievous to the State, by raisinge prices of commodities at home, or hurt of trade, or generallie inconvenient; the said fourteene yeares to be (accomplished) (f) from the date of the first letters patents or

(c) So in STATUTES OF THE REALM, 1819 Edition.

(d) The fifth section was repealed by the S. L. R. Act, 1863 (26 & 27 Vict. c. 125, s. 1).

(e) The words within brackets [ ] were repealed by the S. L. R.

Act, 1888 (51 Vict. c. 3, s. 1, Sch. Pt. I.).

(f) The copy of the statute preserved in the Library of Trinity College, Cambridge, reads "accompted" here.



grant of such priviledge hereafter to be made, but that the same shall be of such force as they should be if this Act had never byn made, and of none other.

VII. Provided alsoe, [and it is hereby further intended declared and enacted by the authoritie aforesaid] (*g*) that this Act or any-thing therein conteyned shall not in anywise extend or be prejudiciall to any graunt or priviledge power or authoritie whatsoever heretofore made graunted allowed or confirmed by any Act of Parliament now in force, so long as the same shall so continue in force.

Proviso for existing grants by Act of Parliament.

VIII. Provided alsoe, that this Act shall not extend to any warraunt or privie seale made or directed, or to be made or directed by his Majestie his heirs or successors, to the Justices of the Courts of the King's Bench or Common Pleas, and Barons of the Exchequer, Justices of assize, Justices of oyer and terminer, and goale deliverie Justices of the peace, and other justices for the tyme being, having power to hear and determyne offences done against any penall statute, to compound for the forfeitures of any penall statute depending in suite and question before them or any of them respectively, after plea pleaded by the partie defendant.

Proviso for warrants to justices to compound penalties.

IX. Provided alsoe, [and it is hereby further intended declared and enacted] (*h*), that this Act or any thing therein contayned shall not in any wise extend or be prejudiciall unto the city of London, or to any cittie borough or towne corporate within this Realme, for or concerning any graunts charters or letters patents to them or any of them made or granted, or for or concerning any custome or customes used by or within them or any of them, or unto any corporacions companies or fellowshippes of any art trade occupacion or mistery, or to any companies or societies of merchants within this Realme, erected for the mayntenance enlargement or ordering of any trade of merchandize, but that the same charters customes corporacions companies fellowshippes and societies, and their liberties priviledges power and immunities, shalbe and continue of such force and effect as they were before the making of this Act, and of none other; Any thing before in this Act contayned to the contrary in any wise notwithstanding.

Proviso for charters of London and other corporations.

X. (*i*) Provided also and be it enacted, that this Act or any declaracion provision disablement penaltie forfeiture or other thing before mencioned, shall not extend to any letters patents

Proviso for patents concerning printing, saltpetre,

(*g*) The words within brackets [ ] were repealed by the S. L. R. Act, 1888 (51 Vict. c. 3), s. 1, Sch. Pt. I.

1888 (51 Vict. c. 3, s. 1, Sch. Pt. I.).

(*i*) Sects. 10—12 were repealed by the Patents Act, 1883 (46 & 47 Vict. c. 57, s. 113, and Sch. 3).

(*h*) Repealed S. L. R. Act,

gunpowder,  
ordnance, &c.  
and grants  
of offices.

or grants of priviledge heretofore made or hereafter to be made of for or concerning printing; nor to any commission graunt or letters patents heretofore made or hereafter to be made of for or concerning the digging making or compounding of salt-peter or gunpowder; or the casting or making of ordinance or shot for ordinance; nor to any graunt or letters patents heretofore made or hereafter to be made of any office or offices heretofore erected made or ordayned, and now in being and put in execucion, other then such offices as have been decayed by any his Majesties proclamacion or proclamacions; but that all and every the same graunts commissions and letters patents, and all other matters and things tending to the maynteining strengthening or furtherance of the same or any of them, shalbe and remayne of the like force and effect, and no other, and as free from the declaracions provisions penalties and forfeitures containyd in this Act, as if this Act had never ben had nor made, and not otherwise.

Proviso for  
patents, &c.  
concerning  
allum mines.

XI. (*h*) Provided also and be it enacted, that this Act or any declaracion provision disablement penaltie forfeiture or other thing before mencioned, shall not extend to any commission graunt letters patents or privilege heretofore made or hereafter to be made of for or concerning the digging compounding or making of allome or allome mynes, but that all and every the same commissions graunts letters patents and privileges shalbe and remayne of the like force and effect, and no other, and as free from the declaracions provisions penalties and forfeitures conteyned in this Act, as if this Act had never byn had nor made, and not otherwise.

Proviso for  
customs, &c.  
of hoastmen  
of Newcastle  
as to coals.

XII. (*h*) Provided also and be it enacted, that this Act or any declaracion provision penaltie forfeiture or other thing before mencioned, shall not extend or be prejudicall to any use custome prescripcion franchise freedome jurisdiction immunitie libertie or priviledge heretofore claymed used or enjoyed by the governors and stewards and brethren of the fellowshippe of the hoastmen of the town of Newcastle uppon Tyne, or by the auncient fellowshipp guild or fraternitie commonlie called hoastmen; for or concerning the selling carrying lading disposing shipping venting or trading of or for any seacoales stonecoales or pitcoales forth or out of the haven and ryver of Tyne; or to a graunt made by the said governor and stewards

(*h*) Sects. 10—12 were repealed by the Patents Act, 1883 (46 & 47 Vict. c. 57, s. 113, Sch. 3).

and brethren of the fellowship of the said hoastmen to the late Queene Elizabeth, of any dutie or somme of mony to be paid for or in respect of any such coales as aforesaid; nor to any graunts letters patents or commission heretofore graunted or hereafter to be graunted of for or concerning the licensing of the keepinge of any taverne or tavernes or selling uttering or retayling of wines to be drunke or spent in the mansion house or houses, or other place, in the tenure or occupacion of the partie or parties so selling or uttering the same; or for or concerning the making of any composicions for such licenses, so as the benefitt of such composicions be reserved and applyed to and for the use of his Majestie, his heirs or successors, and not to the private use of any other person or persons.]

Licences for taverns, &c.

XIII. (i) Provided alsoe and be it enacted, that this Acte or any declaracion provision penaltie forfeiture or other thing before mentioned shall not extend or be prejudiciall to a graunt or priviledge for or concerning the making of glasse by his Majesties letters patents under the Greate Seale of England bearing date the two and twentieth day of May in the one and twentieth yeare of his Majesties raigne of England made and graunted to Sir Robert Maunsell Knight, Vice Admirall of England; nor to a graunt or letters patents bearing date the twelveth day of June in the thirteenth yeare of his Majesties raigne of England, made to James Maxwell Esquire, concerning the transportacion of Calves Skinnes but that the said severall letters patents last mencioned shalbe and remaine of the like force and effect, and as free from the declarations provisions penalties and forfeitures before mencioned as if this Acte had never byn had nor made and not otherwise.

Proviso for grant for glass making.

Exportation of calves skins.

XIV. (i) Provided also and be it declared and enacted that this Act or any declaracion provision penaltie forfeiture or other thing before mencioned shall not extend or be prejudiciall to a graunt or priviledge for or concerning the making of Smalt by his Majesties letters patents under the greate Seale of England bearing date the sixteenth day of February in the sixteenth yeare of his Majesties raigne of England made or graunted to Abraham Baker; nor to a graunt of priviledge for or concerning the melting of Iron Ewer and of making the same into castworkes or barres with seacoales or pitcoales by his Majesties letters patents under the great seale of England bearing date the twentieth day of Februarie in the nyneteenth yeare of his Majesties raigne of England, made or

Proviso for grant for making smalts.

Melting iron ore.

(i) Sects. 13 and 14, although not repealed, are treated as personal enactments, and, as such, are not

printed among the public general Acts. See 1 Revised Statutes, 1888, p. 570.

graunted to Edward Lord Dudley, but that the same severall letters patents and graunts shalbe and remayne of the like force and effect and as free from the declaracions provisions penalties and forfeitures before mencioned as if this Act had never byn had nor made, and not otherwise.

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## II.—SELECTED PASSAGES FROM THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (46 & 47 VICT. C. 57).

### *Compulsory Licenses.*

Power for Board to order grant of licenses.

22. If on the petition of any person interested it is proved to the Board of Trade that by reason of the default of a patentee to grant licenses on reasonable terms—

- (a.) The patent is not being worked in the United Kingdom ; or
- (b.) The reasonable requirements of the public with respect to the invention cannot be supplied ; or

(c.) Any person is prevented from working or using to the best advantage an invention of which he is possessed, the Board may order the patentee to grant licenses on such terms as to the amount of royalties, security for payment, or otherwise, as the Board, having regard to the nature of the invention and the circumstances of the case, may deem just, and any such order may be enforced by *mandamus*.

### *Revocation.*

Revocation of patent.

26. (1.) The proceeding by *scire facias* to repeal a patent is hereby abolished.

(2.) Revocation of a patent may be obtained on petition to the Court. . . . .

(5.) The plaintiff (*a*) must deliver with his petition particulars of the objections on which he means to rely, and no evidence shall, except by leave of the Court or a judge, be admitted in proof of any objection of which particulars are not so delivered.

(6.) Particulars delivered may be from time to time amended by leave of the Court or a judge.

(7.) The defendant (*b*) shall be entitled to begin, and give evidence in support of the patent, and if the plaintiff gives

(*a*) “Plaintiff” in this place, of course, signifies the petitioner.

evidence impeaching the validity of the patent the defendant shall be entitled to reply. . . .

*Legal Proceedings.*

29. (1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the judge, at any subsequent time, particulars of the breaches complained of. Delivery of particulars.

(2.) The defendant must deliver with his statement of defence, or, by order of the Court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

(3.) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him.

(4.) At the hearing no evidence shall, except by leave of the Court or a judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered.

(5.) Particulars delivered may be from time to time amended, by leave of the Court or a judge.

(6.) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case.

30. In an action for infringement of a patent, the Court or a judge may on the application of either party make such order for an injunction inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or a judge may see fit. Order for inspection, &c. in action.

31. In an action for infringement of a patent, the Court or a judge may certify that the validity of the patent came in question; and if the Court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action on obtaining a final order for judgment in his favour shall have his full costs charges and expenses as between solicitor and client, unless the Court or judge trying the action certifies that he ought not to have the same. Certificate of validity questioned and costs thereon.

32. Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other Remedy in case of groundless

(b) "Defendant" in this place, of course, signifies the respondent.



threats of  
legal pro-  
ceedings.

person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.

*Miscellaneous.*

33. Every patent may be in the form in the First Schedule to this Act. . . .

*Definitions.*

Definitions of  
patent,  
patentee, and  
invention.

46. In and for the purposes of this Act—

“Patent” means letters patent for an invention:

“Patentee” means the person for the time being entitled to the benefit of a patent:

“Invention” means any manner of new manufacture the subject of letters patent and grant of privilege within section six of the Statute of Monopolies (that is, the Act of the twenty-first year of the reign of King James the First, chapter three, intituled “An Act concerning monopolies and dispensations with penal laws and the forfeiture thereof”), and includes an alleged invention.

In Scotland “injunction” means “interdict.”

*General.*

Seal of patent  
office.

84. There shall be a seal for the patent office, and impressions thereof shall be judicially noticed and admitted in evidence.

*General Definitions.*

General  
definitions.

117. (1.) In and for the purposes of this Act, unless the context otherwise requires,—

“Person” includes a body corporate:

“The Court” means (subject to the provisions for Scotland, Ireland, and the Isle of Man) Her Majesty’s High Court of Justice in England:

“Law Officer” means Her Majesty’s Attorney-General or Solicitor-General for England:

“The Treasury” means the Commissioners of Her Majesty’s Treasury:

“Comptroller” means the Comptroller General of Patents, Designs, and Trade Marks: . . . .

## FORM D.

## FORM OF PATENT.

(c) Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith: To all to whom these presents shall come greeting:

Whereas *John Smith*, of 29, *Perry Street, Birmingham*, in the county of *Warwick, Engineer*, hath by his solemn declaration represented unto us that he is in possession of an invention for "*Improvements in Sewing Machines*," that he is the true and first inventor thereof, and that the same is not in use by any other person to the best of his knowledge and belief:

And whereas the said inventor hath humbly prayed that we would be graciously pleased to grant unto him (hereinafter together with his executors, administrators, and assigns, or any of them, referred to as the said patentee) our Royal Letters Patent for the sole use and advantage of his said invention:

And whereas the said inventor hath by and in his complete specification particularly described the nature of his invention:

And whereas we being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request:

Know ye, therefore, that We, of our especial grace, certain knowledge, and mere motion do by these presents, for us, our heirs and successors, give and grant unto the said patentee our especial license, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may at all times hereafter during the term of years herein mentioned, make, use, exercise, and vend the said invention within our United Kingdom of Great Britain and Ireland, and Isle of Man, in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention, during the term of fourteen years from the date hereunder written of these presents: And to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, We do by these presents for us our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in

(c) For commentary, see above, Chap. V., pp. 106—132.



### III.—PATENTS RULES, 1890, RELATING TO PROCEEDINGS UNDER THE 22ND SECTION OF THE PATENTS ACT.

These Rules are made by virtue of the authority given to the Board of Trade by section 101 of the Patents, &c. Act of 1883 (46 & 47 Vict. c. 57), as follows:—

101. (1) The Board of Trade may from time to time make such general rules and do such things as they think expedient, subject to the provisions of this Act— . . . .
- (g) Generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the comptroller, or of the Board of Trade.
- Power for Board of Trade to make general rules for . . . and regulating business of patent office.

#### *Compulsory Licenses.*

60. A petition to the Board of Trade for an order upon a patentee to grant a license shall show clearly the nature of the petitioner's interest, and the ground or grounds upon which he claims to be entitled to relief, and shall state in detail the circumstances of the case, the terms upon which he asks that an order may be made, and the purport of such order.

Petition for compulsory grant of licenses.

61. The petition and an examined copy thereof shall be left at the Patent Office, accompanied by the affidavits, or statutory declarations, and other documentary evidence (if any) tendered by the petitioner in proof of the alleged default of the patentee.

To be left with evidence at Patent Office.

62. Upon perusing the petition and evidence, unless the Board of Trade shall be of opinion that the order should be at once refused, they may require the petitioner to attend before the comptroller, or other person or persons appointed by them, to receive his or their directions as to further proceedings upon the petition.

Directions as to further proceedings unless petition refused.

63. If and when a *prima facie* case for relief has been made out to the satisfaction of the Board of Trade, the petitioner shall upon their requisition, and on or before a day to be named by them, deliver to the patentee copies of the petition and of the affidavits or statutory declarations and other documentary evidence (if any) tendered in support thereof.

Procedure.

Petitioner's evidence.

64. Within fourteen days after the day of such delivery the patentee shall leave at the Patent Office his affidavits or statutory declarations in opposition to the petition, and deliver copies thereof to the petitioner.

Patentee's evidence.

Evidence in  
reply.

65. The petitioner within fourteen days from such delivery shall leave at the Patent Office his affidavits, or statutory declarations in reply, and deliver copies thereof to the patentee; such last-mentioned affidavits or declarations shall be confined to matters strictly in reply.

Further  
proceedings.

66. Subject to any further directions which the Board of Trade may give the parties shall then be heard at such time, before such person or persons, in such manner, and in accordance with such procedure as the Board of Trade may, in the circumstances of the case, direct, but so that full opportunity shall be given to the patentee to show cause against the petition.

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*Extract from Form H. :—*

FORM OF APPLICATION FOR COMPULSORY GRANT OF LICENSE.

. . . . hereby request you to bring to the notice of the Board of Trade the accompanying petition for the grant of a license to me by . . . .

To the Comptroller,  
Patent Office.

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*Extract from Form H. 1:—*

FORM OF PETITION FOR COMPULSORY GRANT OF LICENSES.

To the LORDS of the COMMITTEE of PRIVY COUNCIL for TRADE.

The Petition of . . . .

Showeth as follows:—

(*For the substance of the petition see above, p. 100.*)

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*Form I.*

Is a form of opposition to the compulsory grant of license in the shape of a letter addressed to the Comptroller at the Patent Office.



## APPENDIX IV.

### ILLUSTRATIVE DOCUMENTS.

	PAGE
Sect. 1.—Patent .....	249
2.—Proclamation .....	262
3.—Dispensation .....	263
4.—Protection .....	264

#### SECT. 1.—FORM OF THE PATENT GRANT.

FOR the purpose of this illustration the Patent to John Gilbert for a water plough, granted by King James I. in 1618, is set out as a model, and the various extracts which it is proposed to bring to bear upon it by way of illustration are interpolated at appropriate places.

The patent to Jno. Gilbert is taken from Rymer's *Fœdera*, vol. 17, fo. 102. Rymer's reference to the original enrolment is A.D. 1618, Pat. 16, J. 1, p. 5.

*De concessione libertatis Johanni Gilbert super machina ad promendum aquas inventa.*

James by the grace of God &c. to all to whom these presents shall come, Greeting,

Whereas our wellbeloved subject *John Gilbert* through his great Industry Travaile and Charge in forraigne kingdoms and countries hath attayned invented and found out a certain new engine or instrument called or termed a water plough for the taking up of Sand Gravell Shelves or Banckes out of the River of Thames and other Havens Harbors Rivers or Waters wherewith they are choaked for the freer passage and safety of shippes and other vessells and whereas our said subject hath at his like Industrie Travaile and charges invented another Engine

Recital of  
the inven-  
tion.

Dredger.

Pump. or Instrument for the raising of Waters in a greater quantity and to a greater height than heretofore hath bin knowne or practised in these our Realmes which said Engin for raising of Waters is to be moved and driven either by some Current or Streame of Water, or, for want thereof, by strength of Horses and is very necessarye for the drawing and draining of Coal Pits and other Mines. And whereas it is supposed that the said several Engines are the proper invention of the said *John Gilbert* and are likely to prove of good and necessary use for the Service and Benefit of this our Realme.

Utility.

Know ye therefore that Wee  
 Considera- Tendring the common Good and Benifit that may  
 tion. redound hereby to our said Realme and Subjects and  
 Public good. intending to reward and recompence the Industrie  
 Bounty. Travaile and Charges of the said *John Gilbert* bestowed and expended in and about the investigation and fynding out of the said Inventions Ensigns or Instruments above mentioned and the better to incourage other of our Subjects in such lawfull and commendable Labours and Indeavors as may tend to good Use and Service in this our Realme, without just cause of Greivance to anie our Subjects, at the humble Petition of the said *John Gilbert*, and in consideration of the yerelie Rent in and by these Presents reserved and payable to Us our Heires and Successors,

Petition.

This recital of the Royal regard for the public good in the grant of the patent may be compared with the considerations recited as leading up to the grant of an ordinary trade charter, and the following extract from the charter of Edward III. to the Drapers' Company of London may serve as an illustration:—

(a) And whereas it has been shown to us and to our Council that people of divers mysteries of the City of London intermix themselves with the *Mystery of Drapery* and cause divers deceits and fraudes in the use of the same mystery to the great damage of us and of our people. . . .

Of our especial Grace, certain knowledge and meere Motion, have given and graunted, and, by these Presents, for Us our Heires and Successors, doe give and graunte full

Especial  
 grace, &c.  
 Grant of

and sole Licence, Power, Priviledge and Authoritie unto the said *John Gilbert* his Executors Administrators and Assignes, that he the said *John Gilbert*, his Executors Administrators and Assigns, onely and none other by him or themselves or by his or there deputies servants workemen or agents, at all tymes and from tyme to tyme for and during the term of yeres hereafter in and by these presents graunted shall and may within this our Realme of England and dominion of Wales frelie and lawfully (b) make forme erect and frame the said Engine or Instrument called a Water Plough or by what other name the same shall be called or soe many of the same as he shall think meete for taking upp of sandes gravell shelves or bankes out of the said River of Thames and other havens harbors or rivers wherewith they are hindered or choked; and alsoe the said other Engine or Instrument to be moved or driven by some Current of Water, or in default thereof by the Strength and Labor of Horses, for the raysing of Waters and drawing and drayning of Colepits and other Mynes herein before mentioned;

power to  
make.

**(b) Freilie and lawfully.**

This licence to carry on the industry *freely* signifies, I apprehend, unfettered by any trade regulations such as the Fellowships imposed upon their members and sometimes upon other craftsmen. The idea is expressed in many different ways in patent grants. In Ramsay's patent, for example, the King grants "full and free licence, privilege, power and authority" (b). In Mansell's Glass Patent (21 Ja. 1.) it was "full and free liberty license, &c., at his will and pleasure . . . to use, exercise, practise, set up and put in use the art, feat and mystery of making all manner of drinking glasses, &c. and throughout this our Realme . . . and within every and any part of them . . . to make, erect and set up . . . furnaces &c. (c).

"Freely and  
lawfully  
make," &c.

The Smalt patent is even more explicit. There the patentees have "full, free and lawful power, licence, &c., in all and every county, city, town corporate and other towns, villages, hamlets, and other places exempt as not exempt to make work and compound the said stuff called Smalt. and the same . . . to utter, sell and put to sale . . . to any

(b) Ry. 17 Fœd. 122, misnumbered 722 in the original edition.

(c) 1 W. P. C. 21.

A counter-  
vailing  
privilege.

painters, linnners or other persons whatsoever within this our Realm or any part thereof . . . any law, statute, act of parliament, proclamation, restraint or any other matter, cause, or thing whatsoever to the contrary notwithstanding" (*e*).

Bearing of  
the grant on  
trading  
privileges.

That such powers operated in derogation of trading privileges is quite clear upon the history of trade in the Middle Ages. The petition from the Citizens of London and others mentioned in the following passage, extracted from Viner, may serve the purpose of illustration (*f*):—

Similarly Rot. Parl. 43 E. 3, ij. The City of London and other Cities and Boroughs petition that in accordance with their ancient franchises none should sell merchandises nor victual at retail if they were not infranchised within the City, and "it was assented that those of London and no other sell at retail victual only, and this of the especial grace of the King till the next Parliament that it be well ruled and governed in the meantime to the common profit, and it is the intention of the King that no prejudice be done to the aliens who have franchises by charters of Kings."

The Complaint of the Stationers' Company concerning Roger Woodde's patent mentioned above (*g*) is another case in point.

Nature of  
trading  
privileges.

On the other hand the importance to the patentee of being freed from interference on the part of the Fellowships and Guilds in the development of a new industry is manifest at a glance. It has only to be borne in mind that a trading company's charter quite commonly conferred power upon the Court of Assistants to "frame, constitute, ordain and make from time to time reasonable laws, statutes, ordinances, decrees and constitutions which to them [twelve] shall seem to be good, wholesome, useful, honest and necessary according to their sound discretions for the good rule, direction, government and correction of . . . all other persons . . . exercising and using the said mystery" (*h*).

An inventor whose invention had any merit from the point of view of the great public would be pretty sure to be corrected out of existence by the petty public whose trade he

(*e*) 1 W. P. C. 9.  
(*f*) Vin. Ab., tit. Prerogative  
of the King (U. c.) 5.

(*g*) See above, p. 122.  
(*h*) Drapers' Charter of 4 Ja. 1;  
1 Herbert, 489.

proposed to improve under a discipline of this domestic order.

And the same Engines and Instruments, so to be made formed and framed, shall and may lawfullie and solye exercise, use and ymploye to and for the intents and purposes aforesaid within our said Realme of England and Dominion of Wales, and in everie part thereof, to and for his and there most Benifit Profit and Advantage, and the said Sands, Gravell, Banks or Shelves, by the use and helpe of the said Water Plough so to be taken upp as aforesaid, to land and lay on Shore, or otherwise to dispose of at his or their Will and Pleasure, and for his and there best Benifit and Advantage.

Grant of  
power to use.

And that he the said *John Gilbert* his Executors Administrators and Assignes, by him or themselves, or his or there Deputyes, Servants, Workmen or Agents, after the same severall Engines and Instruments or either of them shall be by him or them made formed and framed as aforesaid, shall and may lawfullie for his or there Benifit, and at his and their Wills and Pleasures, within this our Realme of England and Dominion of Wales, graunte or dispose of the same to anie Person or Persons that shall bee desirous or willing to have or use the same for anie the intents and purposes aforesaid.

Grant of  
power to sell  
or otherwise  
dispose of.

And,

To the ende that the said *John Gilbert* his Executors Administrators and Assignes may have and enjoye the full and sole Benifit and Commoditie of the making, forming, framing, using and disposing of the said severall Engins or Instruments, by him devised and invented as aforesaid, within our said Realme of England and Dominion of Wales for the terme of Yeres by theis Presents graunted, as a Recompence which We intend the said *John Gilbert* for his Labor Industry and Charge expended and employed in and about the attaynement of the premisses.

Inducement.

**To the end that.** The importance of this clause as settling the logical connection between the different parts of the patent has been pointed out above (*i*). As here expressed, it indicates quite clearly that the grant made by the patent



is to take effect by virtue of the prohibition following, thus assigning to what has gone before the rank of a declaration of intention as against the effectual act which is embodied in what follows. This significance was more fully developed in the later form of the patent grant, and is quite unmistakeable in the form prescribed by the Patent Law Amendment Act of 1852 (*k*), which at this place ran as follows:—"And to the end that he, the said [*inventor*], his executors, administrators and assigns, and every of them, may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared," &c.

Inhibition.  
See above,  
p. 127.

Our Will and Pleasure is, and We doe, by these Presents, and in favor of the said *John Gilbert* his Executors Administrators and Assignes, for Us our Heires and Successors, straitely charge require and comaunde all and everie Person and Persons, of whatsoever Estate, Degree or Condition he or they bee, other then the said *John Gilbert* his Executors Administrators or Assignes, that they or anie of them shall not or doe not, within this our Realme of England and Dominion of Wales, or in any parte thereof, for and during the terme of Yeres hereafter in and by these Presents granted, make, erecte, forme or frame the said severall Engins or Instruments herein before mentioned, or either of them, nor shall counterfeite imitate or resemble the same, or either of them, in all or any the Parts or Members of the same, nor shall use exercise or employe, for any the Uses Intents and Purposes aforesaid, any such Engins Instruments or Devises whatsoever made or to be made in resemblance or imitation of the said Engins and Instruments of the said *John Gilbert* herein before mentioned, without the Licence and Consent of the said *John Gilbert* his Executors Administrators and Assignes in that behalfe first had and obteyned in Writing under his or there Hands and Seales, upon payne of the Losse and Forfeiture of all and everie such Engins Instruments and Devises as shall be so made, erected, framed, used, or imployed contrarie to the true intent and meaning of these Presents; and also upon such further Paynes, Penalties, Fynes and Imprisonments, as by the Lawes and Statutes of this our Realme, or otherwise by our

Saving of  
licensees.

Forfeiture of  
contraband.  
See below,  
p. 258.

Prerogative Royall, can or may be inflicted uppon everie such Offendor or Offendors for his or there Contempt Disobedience or Neglect of our Royall Pleasure and Commandement in that behalfe.

The exclusive rights here granted and the penalties by which they are safeguarded, are in all respects parallel to those conferred by a trade charter, as the following extract from the Drapers' charter already mentioned will show:—

(*l*) We . . . have, by the assent of the great and others of our Council, ordained and granted that none shall use the Mystery of Drapery in the City of London, nor in the suburbs of the same unless he has been apprenticed in the same mystery, or in other due manner been admitted by the common assent of the same mystery. And that each of the mysteries of tenterers, tisters and fullers keep himself to his own mystery and in no way meddle with the making, buying or selling of any manner of cloth or drapery on pain of imprisonment and loss of all the cloth so by them made, bought, or sold, or the value thereof, to us. Drapers' privileges.

Queen Elizabeth, by her charter to the Skinners' Company (*m*), granted similar forfeiture of "all manner of fur found manufactured contrary to these ordinances," but the forfeits accrued to the mayor and commonalty of the City. Skinners'.

Edward III., by his charter to the Fishmongers' Company of London, "ordained, declared, and granted that no man, foreign or denizen, under pain of our great displeasure, meddle in any part of the kingdom with the trade of the Fishmongers, except those only who are of the Mystery of Fishmongers and of the Fish Inquest, and that it shall be in the hands of the Fishmongers in London, and sold in the said three places (*n*), and that all fish which comes or shall be sold in the said City of London be discharged nowhere but between Billingsgate and London Bridge, on the bridge, and above the said London Bridge, and between Dibble's Wharf and the Fresh Fish Wharf, and be warehoused, &c. . . . and no stranger bring fish to the same city, nor take any stand for selling fish if he is not of the folk enfranchised in the said Mystery of Fishmongers." . . . (*o*). Fishmongers'.

It has been mentioned above (*p*) that the grant of license See above,  
p. 118.

(*l*) 1 Herbert, 480, Char. of E. III. Fish Street and The Stocks.  
 (*m*) 2 Herbert, 375. (*o*) 2 Herbert, 119.  
 (*n*) *I.e.*, at Bridge Street, Old (*p*) Page 118.

and authority might be of more or less to suit the occasion varying in different patents within considerable limits. This may be illustrated here. The present patent, to *Gilbert*, grants authority to "form, erect and frame, to exercise, use and employ and to grant or dispose of" the two machines which the patentee had invented. The iron smelting patent to Lord Dudley of nearly contemporary date conveyed authority to "use, exercise, practice, and put in use the mystery, art, way, and means of melting iron ore . . . and to make, erect and set up any furnace . . . or engine . . . concerning the said mystery, &c., and the iron so made to utter and sell in gross or by retail, or otherwise to do away at his . . . free will and pleasure to his . . . best commodity and profit" (*q*).

Copyright.

The authority conferred by the Smalt patent has been set out above in illustration of the point that these grants were intended to countervail grants of privilege to the Trade Guilds. It may suffice here to add a single extract from a printer's patent. It will of course be borne in mind that the copyright patents, although relating to a matter so very different from inventions, were nevertheless patents affecting trade and tending to monopolies, and were, as such, within the purview of the Statute of Monopolies, so that they needed to be saved by the exception created by the tenth section of the Act. The following is from the patent granted to Helen Mason for printing the Book of Martyrs. It grants "full, free and sole liberty, license, power, privilege and authority, to print or cause to be imprinted, the said book and to publish, utter, sell, and put to sale, or cause to be published, &c. to her most and best benefit" (*r*).

This form was apparently more accurately settled than the form applicable to inventions, and reappears in substantially identical terms in other similar grants (*s*). But in the grant to Jno. Speede of the copyright in a certain "Genealogy of the Holy Scriptures and map or chart of the Land of Canaan," the patentee is limited to the personal selling of his copies and at scheduled prices (*t*). The grant, therefore, unlike our modern statutable form was framed to suit the individual case when it stood simply on the Common Law.

Habendum.

To have, hold, use, exercise and enjoy all and everie the

(*q*) 1 W. P. C. 14 and 15.

(*r*) Ry. 17 Fœd. 295.

(*s*) See, *e.g.*, Ry. 17 Fœd. 111.

(*t*) Ry. 17 Fœd. 484.

said Licences, Powers, Priviledges and Authorities, Benifits, Profits and other the Premisses, unto the said *John Gilbert* his Executors Administrators and Assignes from the Date of these Presents, for and during the terme, and unto the full ende and terme of *One and Twentie Yeres* from thence next ensuing fullie to bee compleate and ended ;

Yielding and paying therefore unto Us our Heires and Reddendum.  
Successors, the yerely Rent or Somme of *Six Poundes thirteen Shillings and eight Pence* of lawfull Money of England at the Receipt of the Exchequer of Us our Heires and Successors at *Westminster* at the Feests of the Birth of our Lord and the Nativitie of Saint John the Baptist, by even and equal Portions.

The very modest rent reserved in this case goes to show that this was in fact, as it appears from its terms to have been, an unexceptionable patent. The oppressive patents yielded much larger revenues to the King. For example, under the glass patent of 1613, an annual rent of £1,000 was reserved (*u*). The gold wire monopoly was estimated capable of yielding £10,000 a year to the Crown (*v*). But whether the rent were large or small it made the patentee an Accountant of the Crown, and as such gave him a privileged position before the law (*x*).

And, for the better execution and accomplishment of this our Graunte and gracious intende and meaning to the said *John Gilbert*, his executors, administrators, and assignes, Wee do by these presents for Us, our heires, and successors, give and graunt unto the said *John Gilbert*, his executors, administrators, and assignes, and to everie of them, full power and authoritie that he and they and his and there deputies, servants, and agents, shall and may lawfullie from tyme to tyme during the tearme hereby graunted with the assistance of a Constable, Tithing Man, Headborough or other lawfull officer of anie place or places whatsoever respectively within our said Realme of England and Dominion of Wales as well within liberties as without at his and their wills and pleasures at fit and convenient tyme or tymes, go and enter into anie House, Shopp, Workehouse, or Yard or other place or places whatsoever, which shall be probably suspected, and there to search and see if any Engins, Instruments or Devises shall be made

Power of  
search.

(*u*) 1 W. P. C. 19.

(*v*) 41 Arch. 256.

(*x*) See above, p. 63.

Forfeiture of  
contraband.  
See above,  
p. 254.

formed, framed, used or imployed in resemblance or imitation of the said Engins or Instruments herein before mentioned and invented by the said *John Gilbert* as aforesaid, contrarie to the true meaning of these presents, and the same soe founde in the name of Us, our Heires, and Successors to seise take and carrie awaye the one moyetie of which said premisses so forfeyted as aforesaid Wee doe by these Presents give and graunte to the said *John Gilbert* his Executors Administrators and Assignes to his and there owne proper Use and Benifit, without any Accompt or other thing to bee yielded rendred or paid to Us our Heires or Successors for the same, other then the Rent herein before reserved; and the other Moyetie thereof to be from tyme to tyme to the Use and Benifit of Us our Heires and Successors.

The like  
power of  
search and  
forfeiture in  
the trade  
charter.

Drapers.

Goldsmiths.

Skinners.

The power of search was commonly conferred by charter upon the incorporated trade fellowships. Thus the Drapers have power to "enter into all houses, shops, cellars, booths, and other places now or hereafter used or appointed for the keeping or exposing of cloths, of every person or persons, as well free of the same fraternity as free of any other society, or also foreigners using the art or mystery of Drapers within the City of London or the liberties of the same, to search, view and measure, by a sealed standard . . . all yards, ells, godes and other measures whatsoever by which any cloth . . . exposed to sale is or shall be measured," &c., with powers of fine and forfeiture (*y*). Similarly, the Goldsmiths "have the search, inspection, trial, and regulation of all sorts of gold or silver wrought or to be wrought" (*z*), and when counterfeits are found, "to arrest, seize, and to break and spoil them" (*a*). The Skinners have a right of search "as well over the men of the mystery of Skinners and over all others whomsoever, the merchandise and merceries of the same mystery, selling, manufacturing or working, as well in our City of London and the suburbs of the same, and elsewhere without as in whatsoever places, sheds, fairs, and markets throughout our Kingdom of England (*b*).

These instances may suffice for the present purpose. The reader who may be interested to pursue the subject further will find abundant material in Mr. Herbert's book.

(*y*) 1 Herbert, 495.

(*z*) 2 Herbert, 292.

(*a*) *Ibid.* 297.

(*b*) *Ibid.* 380; and see the Merchant Taylors' charter, 2 Herbert, 524.



And, of our further especial Grace, certaine Knowledge, and meere Motion, Wee doe, for Us our Heires and Successors, straitely charge and commaund as well all and everie our Justices of Peace, Mayors, Sheriffs, Constables, Bayliffs, Headboroughes, and others our Officers and Ministers within our said Realme of England and Dominion of Wales, that they and everie of them shall, from time to time during the terme of Yeares hereby graunted, be ayding favoring and assisting unto the said *John Gilbert* his Executors Administrators and Assignes and everie of them, and to his and there Deputies, Servants, Workemen and Agents in and about the due execution of all and singuler the Premisses according to the true intent and meaning of these Presents; And these our Letters Patents, or the Inrollment thereof, shall be to them and everie of them a sufficient Warrant and Discharge in that behalfe, without any further or other Warrant from Us our Heires and Successors to be had or obteyned in that behalf.

Authority to  
magistrates,  
&c. to assist  
the patentee.

This clause also is commonly found in the trade charters. For example, the Goldsmiths' charter contains the following clause: "We also . . . command that all bailiffs, reeves and other officers whatsoever in fairs, markets, cities, boroughs, towns and other places where such search shall happen to be made be ready to aid and assist the said wardens and every of them making such search as aforesaid in the execution of the premises" (c). Similarly the Grocers' charter firmly enjoins orders and commands "all and singular, mayors, justices, bailiffs and constables, officers of the mystery and all other our subjects whatsoever that they be aiding, assisting and comforting to the said Wardens and Assistants . . . in the making having keeping and executing of all and singular by us to the said Wardens and Commonalty of the Mystery aforesaid . . . granted by these our letters patent and every part and parcel thereof" (d).

The like  
authority in  
trade charters.

And further, of our like especiall Grace, certaine Knowledge and meere Motion, Wee doe, for Us our Heires and Successors, grant unto the said *John Gilbert* his Executors Administrators and Assignes, that these Presents, or the Inrollment of the same shall be in and by all things good firme effectually, and of validitie in the Lawe, to all the intents and purposes aforesaid, and shall bee adjudged most strong against Us our Heires and Successors, and

Grant not to  
fail for  
uncertainty.

(c) 2 Herbert, 293.

(d) 1 Herbert, 376.

most available for the Benifit of the said *John Gilbert* his Executors, Administrators and Assignes, in all our Courts of Justice in our said Realme of England and Dominion of Wales or elsewhere, for and during the terme hereby granted, and without any other or further Confirmations Licenses or Tollerations to be from Us our Heires or Successors procured, sued for or obteyned in that behalfe; notwithstanding the not describing, or not perfect or particular describing of the said severall Engins or Instruments herein before mentioned, or the manners, formes or fashion of there use or working; and notwithstanding anie other defect or uncerteintie whatsoever in these our Letters Pattents or anie Act, Statute, Ordinance, Provision or Restriction to the contrarie in anywise notwithstanding.

See above,  
p. 111, below,  
p. 273.

In this form the clause expresses only what was well ascertained to be the legal effect of the words *ex certâ scientiâ* in the King's grant, namely, that they cured uncertainties (*e*), *i. e.*, that if in any part it was ambiguous, the ambiguity should not be pressed to the disadvantage of the patentee.

In some cases an endeavour was made to control the administration of the law by the phraseology of patents in the most undisguised fashion. For example, in the contemporaneous grant to Ramsey and Wildgosse, to which allusion has been already made, there is a clause conferring exclusive jurisdiction upon the Privy Council in the following terms:—

“And further our express Pleasure and Commandment is, that for the avoyd- (*f*) of all subtill malicious perverse and cautelous Practizes and Constructions that may be pretended or attempted to defraud and abuse the good and true meaning of these our Letters Patents, the Interpretation Correction and Punishment of all manner of Offences which shall be committed in this behalf, to the Disadvantage and Hinderance of the said *David Ramsey* and *Thomas Wildgosse* their Executors Administrators or Assignes, shall be referred to the Pryvy Councell of Us our Heirs and Successors for the time being, by theire honorable Dyrection to be punished according to Justice” (*g*).

(*e*) Sav. 5. pl. 14.

(*f*) So in Ry. The word is broken by the end of the line.

(*g*) Ry. 17 Fœd. 122. (This page is misnumbered 722 in the original edition.)

*David Ramsey* enjoyed the advantage of being a page of the bedchamber.

Provided alwayes that these Presents, or anie thing therein conteyned, shall not extend to barr, restraine, impeach or prejudice a late Graunte by Us made to *Robert Crompe*, for touching and concerning the sole making and practise of an Engin by him invented for raising of Waters for Service of Townes, Castles or House, and for the drawing and drayning of Coal pitts and other Mynes, nor shall extend to restrayne anie Person or Persons of or from the making or using of any Engine Instrument or Invention touching the Premisses formerlie found out, or in knowne use or practise within this our Realme or Dominion of Wales; any thing herein conteyned to the contrarie in any wise notwithstanding.

Saving of a prior grant.

Provided alsoe that if the said Yearly Rent or Somme of *Six Poundes thirteene Shillings and eight Pence*, herein before reserved, shall happen to be behinde and unpaied, in parte or in all, by the space of fortie Dayes next after either of the said Feasts in the which the same ought to be paied as aforesaid, that then this our present Graunt shall bee utterlie voyde and of none effect to all intents and purposes; any thing herein conteyned to the contrarye in any wise notwithstanding.

Defeasance.

And moreover We, of our like espe (*h*) Grace, certaine Knowledge and meer Motion doe, for Us our Heires and Successors, give and graunte unto the said *John Gilbert* his Executors and Assignes one Moyetie of all such Treasure Trove, Plate, Jewells, and other Matters and Things of Vallue, as he or they shall take upp by the use and meanes of the said Water Plough out of any Rivers, Havens or Harbors as aforesaid, after he or they shall have made appeare in the Court of Exchequer of Us our Heires or Successors uppon his or their Oath, the full quantitye and vallelwe of the same, and shall have brought unto Us our Heires or Successors the other moyetie thereof.

Grant of treasure trove.

To have and to hold the said Moyetye to him and them thereby intended, during the said Terme, to his and their owne Use Benifit and Behoofe, without anie Accompte or other thing to bee therefore rededer or made to Us our Heires or Successors :

Habendum.

(*h*) So in Ry. The word is broken by the end of the line.

And theis our Letters shall be your sufficient Warrant and Discharge in this behalfe.

Although express mention &c.

In witnes whereof &c.

Teste. Wytnes our self at *Westminster* the sixteenth Day of July.

*Per Breve de Privato Sigillo.*

JOHN GILBERT.

JUL. CÆSAR.

## SECT. 2.—PROCLAMATION.

(See above, p. 34.)

The following is an example of a proclamation issued in furtherance of a patent. Extracted from Rymer's *Fœdera*, Vol. XX., p. 191.

Rymer's reference to the original enrolment is A.D. 1637, Pat. 13, Car. I. p. 15, n. 5, dors.

The proclamation recites—

The invention at the cost and expense, after many chargeable trials, of the Earl of Berks, of the patented kiln.

The utility of the invention.

The grant of the patent; and proceeds—

Substance  
of the pro-  
clamation.

“Now taking into our princely consideration the great benefits of the said invention, and being desirous to further a speedy execution thereof for the good of our said kingdoms and people, We are graciously pleased by this our proclamation to publish the premisses to all our loving subjects that so they may not only know the good, but compounding with the said Earl and his assigns for his licences at a certain place in Fleet Street, near unto Temple Bar in our City of London, appointed on that behalf, may also by virtue of the same licences partake of the benefits of the said invention. And We are further pleased, and do hereby declare our Royal will and pleasure to be, that all and singular our loving subjects who shall be licensed by the said Earl, his executors, administrators, or assigns, to use the said invention or kiln to and for the drying of malt, except such person or persons as are or shall be allowed for common brewers shall and may,

observing the laws and statutes of this Realm, continue their art and mystery of malt making, without the let, disturbance or interruption of Us, our heirs or successors, or any of the officers or ministers of Us, our heirs or successors, and without any further or other composition than such composition as shall be made with the said Earl, his executors, administrators or assigns, concerning the premisses, any Act, Ordinance, Provision, Proclamation or Restraint heretofore had, made, published or provided to the contrary in anywise notwithstanding.

Witness, &c.

Dated at Westminster,  
8th February, 1637.

There are two proclamations purporting to create a monopoly of gold wire making in the hands of the King. They have been published *in extenso* by Dr. Gardiner. See *Archæologia*, Vol. 41, pp. 247 and 260. Also *St. Pap. Dom.* clxxvii. 53, and clxxxvii. 71.

### SECT. 3.—DISPENSATION TENDING TO A MONOPOLY.

(See above, p. 33.)

The following extract from the Acts of the Privy Council for the year 1581 serves to illustrate the point insisted upon above, that the power of dispensation could be utilized to create a monopoly. The present example is a monopoly of foreign trade—the case of monopolies in its second branch deals with an attempt to create in this way a monopoly of domestic trade (*g*).

A letter to the Lord Treasurer with certaine letters enclosed, written unto her Majestie from the Citie of Ham-burge, that it would please her Highnes to graunt licence unto Conrade Silm, an inhabitaunt of their towne, to transporte out of this Realme a certaine proportion of wheate, rye and barlye; forasmuch as their Lordships thincke that the said proporcion of rye and barlye which they require maie be convenientlie spared in the county of Norffolke, &c., their Lordships have thought meete to require his Lordship to geve order that the said Conrade Silm, or such other person as



shalbe appointed to followe that cause, maie be licenced to shipp out of the said county of Norffolke the aforesaid quantitie of rye and barlye; touching their request in their said letter for v<sup>m</sup> quarters of wheate besides, for that by reasons of the licence for Dover Haven and otherwise their Lordships are enformed that the prices are greatlie enhaunsed by occasion of the great quantitie that hathe ben shipped out of manie shires of this Realme, &c., yt is left to his Lordship's good discrecion to helpe them either with the whole or parte in Norffolk, Suffolk, Essex, as (*sic*) suche other place as his Lordship shall thincke good or, otherwise, if this maie not be, to supplie the want thereof with so much rie or barlie as maie be convenientlie spared yielding unto her Majestie such dueties as are accustomed.

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#### SECT. 4.—PROTECTION.

(See above, pp. 36 and 59.)

The following examples of various forms of protection extended to favoured individuals by Queen Elizabeth's Privy Council will serve to explain the strenuous effort made by the Parliament of 1623 to abolish the interference of this body with the course of justice in cases concerning monopolies:—

17 *Martij*, 1581.

A warrant of protection directed to the Lord Mayour and Sheriffes of the Cittye of London, the Sheriffe of the county of Myddlesex, the officers of the Marshall of her Majestie's Household, &c., in the behalf of John Jerningham, esquier, one of her Majesties servants, to be for the space of xx<sup>tie</sup> dayes protected and defended against all manner of arrestes or attachementes to be intended against his persone by anie of his creditours for any actyon of debte, he having certen matters depending before the Lordes and to be determined within the terme of xx<sup>tie</sup> dayes prefixed (*h*).

6<sup>to</sup> *Aprilis*.

A warrant of protectyon directed to the Lord Mayour and Sheriffes of the Cittie of London, the Sheriffe of the county

of Myddlesex, the officers of the Marshall of her Majesties Household, &c., in the behalf of John Jerningham, esquier, one of her Majestie's servauntes, to be for the space of xx<sup>tie</sup> dayes protected and defended against all manner of arrestes or attachementes to be intended against his persone by anie of his credytors for anie actyon of debte, he having certen matters depending before the Lordes to be determined within the terme of the xx<sup>tie</sup> dayes prefixed (i).

A letter to the Lord Maiour, Aldermen and Sheriffes of the Citie of London, now or for the time hereafter beinge, or to anie xij, ix, viij, vj, or iiij<sup>or</sup> of them, wherof the Lord Maiour or one of the Sheriffes to be one, with a Supplicacion enclosed exhibited by certaine Aldermen and others, the creditours of William Handforde, that some reasonable daies and time maie be graunted unto him wherin, without molestacion [of] other of his creditours, he maie seeke the recoverie of such his goodes as are dispersed in divers men's handes, wherwith he maie be hable to satisfie his creditours; they are required to call bothe the said William Handforde and his creditours, especiallie such as wilbe most rigorous against him, before them, and findinge how muche he is endebted unto everye one, to perswade with them to accept of such reasonable daies and condicions of payment as the said Handforde maie in the meane time freele seeke the recoverye of his owne goodes, and in the meane time while they are in treatie with the said creditours about this cause, that in their Lordships' names they geve order to the Sheriffes and Secondaries of bothe Compters that no arrest, action or attachement be commenced or prosecuted against the said Handforde or his goodes, untill they shall have finished this treatie with his said creditours, and that they advertise their Lordships what they shall have don herin, to th' intent that their Lordships, if neade be, maie putt to their further helpinge handes (k).

A letter to Mr. Alderman Pullison, Mr. Aldermen Rave and Allet, Richard Yonge, John Clerke, and William Abram, or anie 5, 4, or 3 of them, thanckinge them for their good will and paines taken to have the (*sic*) compounded the matter betwene Rowlande Winter, her Majesties servaunt, and certaine of that Citie, his creditours; and for that by

(i) 13 Acts, P. C. 381.

(k) 13 Acts, P. C. 112.

their letters it appeareth that uppon examinacion of the matter, they finde that the said Winter had verie hard peny-worthes of his said creditors, losinge xx in the c by the sale of suche wares as he had of them, seing it standeth uppon his undoing and the case deserveth some charitable consideracion, they are once again required, in their Lordships' names, to deale effectuallie with his said creditours, to accept of the offer to geve good assurance for the paiment of as much as is by them demanded within five yeres, in such reasonable sorte as they shall thincke good, wherto if anie of them shall refuse to condescende, minding to proceade against him or his suerties, then to require and commande them by virtue herof to make their repaire their repaire (*sic*) before their Lordships to declare what cause they can pretende to the contrarie, and of their doinges herin to advertise their Lordships with speede convenient (*l*).

A letter unto the Mayour and Sheriffes of the Cittie of London for the staying of all proceedinges that shalbe entred or intended by arrest, attachement, actyon or processe against William Napton, William Woodecocke and Thomas Seywell by anie their creditours, &c., for certen consideracions therein mencioned, &c., according to a minute thereof remainyng in the Councell Cheste (*m*).

A letter to the Commissioners for the debtes of William Woodcocke, William Napton and Thomas Sewell that wheras their Lordships are enformed that not longe sithe there was a Commission directed unto them concerninge the debtes of William Woodcock, William Napton and Thomas Sewell, merchauntes of that Citie, and that the most part of their creditours have ben contented to subscribe a certaine order thought meete to be generallie taken in that behalf, and that some fewe of the rest onelie for some private cause willfullie refuse to yelde thereto; they are required to call the said creditours so obstinatelie refusing before them and to use the best perswacions that they can to induce them to conformitie and to subscribe to the said order as the most parte have don, and in case anie shall refuse so to doe, then to commande them in their Lordships' names to appeare before their Lordships on Sondaie next, where they shall understand what is further to be said unto them, &c. (*n*).

(*l*) 13 Acts, P. C. 420.  
 (*m*) 13 Acts, P. C. 277.

(*n*) 13 Acts, P. C. 345.

That the "perswacions" of the Privy Council skilfully administered on Sundays were very telling can easily be believed. The simple story of Thomas Hampton, of London, Gentleman, as told by the Clerk to the Council in his official minutes, is quite convincing on this point. The poor gentleman makes his appearance on the 8th April, 1582, being "bound to geve his attendance uppon the Lords at everie such tyme as they shoud mete in Councell to receyve such order in certen causes as by them shalbe taken." His attendance is recorded on nine succeeding Sundays, and he even wins an appreciative reference in the margin of the book, where he is denoted by the words "a punctual attendant," but the only communication which appears ever to have been made to him was that he was "commanded to continowe his apparence according to their Lordships' former commandment untill soch time as they shall have given other order to the contrary"(o). As he disappears from the record quite uneventfully after ten weekly attendances, it is fair to assume that the silent "perswacion" of the Privy Council sufficed in his case to compass the desired end, whatever that may have been (p).

(o) 13 Acts, P. C. 402.

(p) 13 Acts, P. C. 383, &c.

## APPENDIX V.

NOTE UPON *REX v. MUSSARY*.

IN the first volume of Webster's Patent Cases (*a*), a report occurs under the title of *R. v. Mussary* of a dictum attributed to Lee, C.J., laying down general rules for the construction of patents. These rules are so very precise and systematic as to challenge the most careful consideration, but as the language in which they are embodied is not quite beyond criticism, and even the authority upon which they rest is to some extent doubtful, it may be convenient to embody in a note the various readings and other matters at present known to affect the weight of this authority.

Mr. Webster quotes from Buller's *Nisi Prius*; his authority being not the author of that book but Mr. Bridgman who edited the edition published in 1817 and introduced the passage extracted by Webster into a note to Book II. Ch. VII. where consequential damages is under discussion. The earlier editions of Buller's *N. P.* contain no reference to the case and Mr. Bridgman does not state from what source he derived the ruling which he attributes to Lee, C. J. There is some reason to think that he relied upon a report that was not rigorously accurate. This will clearly appear from what follows.

The passage is also quoted by Mr. J. W. Thomas, Editor of the 1826 Edition of Sir Edward Coke's Reports. In an elaborate note (vol. 1, p. 103) to the case of *Alton Woods* (*b*) he cites the dictum somewhat more at large

(*a*) 1 W. P. C. 41.(*b*) 1 Co. Rep. 40b.



than as it is found in Buller's *Nisi Prius* although he gives the reference to that work. But Thomas gives a farther reference to Bacon's *Abridgment* as follows—*Bac. Abr. Prerog. F. 2.* This reference requires careful following up, for Bacon's *Abridgment* contains under the title *Prerogative* two passages which are numbered *F. 2.* The latter of the two is the one now in question and it occupies the position of *F. 6.*, so that the figure 2 was presumably at first a misprint for 6. But as the misprint occurred in the original edition of 1759 and was repeated in successive editions down at least to the seventh (of 1832) it must perhaps rather be regarded now as a feature of the book than as a mere printer's error. As it makes the difficulty of finding the passage equally great—whatever its cause—it may properly be noted here. The exact reference to the original edition of *Bac. Ab.* is Vol. IV. p. 210 (c).

The dictum as given by Bacon is introduced with the following exordium:—

“As the King's grants proceed chiefly from his own bounty, and his letters patent are records of a high nature, they ought to contain the utmost truth and certainty, and have in all times been construed most favourably for the King contrary to the grants of common persons, and accordingly in a great variety of cases we find uncertainty, misrecitals, false suggestions, and all such matters as show that the King was deceived in his grant, held such reasons as have been sufficient to vitiate the grant.

“In a matter therefore in which such great exactness has been required, it may be necessary in the first place to lay down the following general rules.”

There is nothing here to show that the writer is borrowing his text; on the contrary, he appears to be producing it, and the references which he gives to authorities are only to such as establish his point. He does not allude to the case of *Rex v. Mussary*, or to any report upon which he has drawn in the way of quotation. If Messrs. Thomas and Bridgman had not avouched Lee, C. J., for the author

of the general rules which follow at this point in the Abridgment, the modern reader would have no hesitation in attributing them to Matthew Bacon.

The case cited—*Rex v. Mussary*—may be probably identified with one reported under the name of *The King* against *Massory*, by Andrews (*b*). That was a *Quo warranto*, in which the defendant relied upon letters patent granted to the town of Maidstone to sustain his election to the office of jurat of that town. The Crown put forward a charter of later date, and the question to be decided upon the demurrer was whether the charter (later in date) had granted a new mode of election, the defendant having been elected in accordance with the mode prescribed in the patent. Questions of construction thus arose which may well have occasioned a systematic examination by the Court of the rules of construction applicable to grants from the Crown. But Andrews does not in fact report any such examination of the subject in connection with this case.

Andrews, however, reports another case, *The King* against *Blunt* (*c*), which comes next before *The King* against *Massory* in his volume of Reports, and which also was a *Quo warranto* against another usurper of the office of jurat, who based his pretensions on the same Patent upon which Massory relied. This case is reported by Andrews in greater fulness than Massory's case, and was tried by Lee, C.J. Both cases were heard in the Term—Michaelmas, 1738—to which both our authorities refer the hearing of *Rex v. Mussary*, and in Andrews' report of *The King* against *Blunt* there is a traceable resemblance to the passage now under discussion. The following extract will make this clear:—

“And the whole Court was of opinion that upon construction of the last charter the right of election is in the mayor, jurats and commonalty. For (as Lee, C.J., said) the words ‘it shall and may be lawful,’ &c. are express words of grant, and therefore this charter must operate as a new grant. And supposing the King to be here deceived in the reciting part yet, as the words of grant are sufficient to show his intention, the misrecital will not vitiate the charter, especially

(*b*) Andr. 295.

(*c*) Andr. 293.

as it is not the false suggestion of the party nor part of the consideration. And the Chief Justice cited *Lord Chandos' Case*, 6 Co. 55*b*; Carth. 350. *King and the Bishop of Chester*, Hil. 9 W. 3" (*d*).

The misrecital here in question was a misrecital of the terms of a former charter earlier than the Patent. The former charter had empowered the "mayor, jurats and commonalty" to elect new jurats. The later charter recited this former one as empowering the mayor and jurats only to elect, and proceeded that "it shall and may be lawful to and for the mayor, jurats and commonalty" to elect. In appearance, therefore, the new charter abrogated the old, but in effect it revived the old charter, which had in the interval been abrogated by the Patent. The argument against the new charter, therefore, was that the King was deceived, because he was led to believe that he was conferring new rights on the commonalty, when he was, in fact, restoring their old right of election. The judgment was that, even so, that would not avoid the grant.

The general rules as formulated in the Abridgment are as follows:—

"First, That in the construction of letters patent every false recital in a part *not* <sup>(1)</sup> material will not vitiate the grant, if the King's intent sufficiently appears; this was so held in the case of *The King and Bishop of Chester* (*e*), where the grant was made to a person as a knight who, in truth, was no knight, and though the grant was held void for this reason in B. R., yet the judgment was reversed in Parliament."

(1) In the fourth (*f*) and subsequent editions of Bacon's Abridgment this word "not" is omitted, and the passage reads: "every false recital in a part material will not vitiate," &c. The omission is very possibly due to a printer's error, unobserved in editing, for if the change had been intentionally made it would probably have been emphasized. But, curiously enough, the proposition, with or without the

(*d*) Skin. 651.

(*e*) 5 Mod. 297; 2 Salk. 560; Carth. 440; Skin. 651, pl. 1; 1 Ld.

Raymond, 292.

(*f*) I have not seen the second and third Editions.

“not,” is equally good law. Without the “not” it signifies, of course, that a misrecital, although it touches matter of substance, does not avoid the grant if it touch the matter only in such a way as not to affect the consideration for the grant, and this is precisely the effect of the authority cited, for there is no denying that the naming of a person as a knight who did not enjoy that dignity might occasion such confusion and uncertainty as must in the nature of things avoid the grant. In other words, it is a “misrecital in a part material,” in fact in the most material part of all, namely, the identification of the grantee. The affirmative proposition, of course, involves the negative, so that it is not possible to say certainly whether the earlier or the later edition of the Abridgment is to be regarded as embodying the authentic text.

“Secondly, That if the King is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant, and so was the resolution in the case of *The King v. Kemp*” (*f*).

“Thirdly, That though the King mistakes either in matter of law or fact, yet if this is not any part of the consideration of the grant it will not vitiate it, and so is *Lord Chandos Case* (*g*), which was thus: Henry the Seventh granted to Lord *Chandos* a manor in tail, and the same King by other letters patent reciting the former grant, and that the said Lord *Chandos* had surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the King was and is seised in fee, did grant the said manor to husband and wife and to the heirs of the husband, &c. Now, though by the surrender of the first letters patent the estate tail was not determined and so the King not seised of the manor in fee as he recited he was in the second grant—for he had only a reversion in fee expectant upon the determination of the estate tail—yet the cause, viz., *by virtue whereof we are seised in fee*, being what the King collected to be the consequence of

(*f*) 4 Mod. 277; Carth. 350; Skin. 446, pl. 4; 1 Lord Raym. 49.  
Comb. 334; Salk. 465, pl. 2; (*g*) 6 Co. Rep. 55.

the surrender, and not at all owing to the mis-information of the party, either as to the entail or surrender, the mistake which he made being no part of the consideration the grant was held good.

“Fourthly, That the words *ex certâ scientiâ et mero motu* in the King’s Charters and letters patent do occasion them to be taken in the most benign and liberal sense according to the intent of the King expressed in his grant (*h*).

A marginal note in this place reads :—

“*But where the King in his grant recites a thing which is false, that shall not make the patent good although the words be ex certâ scientiâ et mero motu, 10 Co. Rep. 112; 3 Leon. 249; Plow. 502; 3 Co. Rep. 4; Savil. 5, 37; Dyer, 300; 2 Salk. 561. In Rex v. Capper, 5 Pri. 217, it was doubted whether the words ex certâ scientiâ et mero motu reduced a royal grant to the same rules of construction as a private grant.*

“Fifthly, That though in some cases general words of a grant may be qualified by the recital, yet if the King’s intent is plainly expressed in the granting part it shall enure according to that, and is not to be restrained by the recital.”

A marginal note reads :—

“*So held in the King and Bishop of Chester, which is grounded on Legat’s Case, 10 Co. Rep. 112.*”

To these rules Bacon subjoins the following, derived from the argument of *The King v. Sir Francis Clark* (*i*), and supported by the authorities cited.

“1. Where a particular certainty precedes it shall not be destroyed by an uncertainty or a mistake coming after (*k*).

“2. That there is a difference when the King mistakes his title to the prejudice of his tenure or profit and when he is mistaken only in some

(*h*) Br. Ab. Patents, pl. 80; Plow. 337; 6 Co. Rep. 56; 3 Leon. 249.

(*i*) 1 Mod. 195; 2 Mod. 1; 3 Keb. 412.

(*k*) Cro. Eliz. 34, 48; Yelv. 42; 3 Leon. 162; And. 148; 2 Godb. 423; *Markham’s Case*, 10 Co. Rep.: *Legat’s Case*, 10 Co. Rep. 109.



description of his grant which is but supplemental and not material or issuable (*l*).

"3. That distinct words of relation in the King's grant are good to pass away anything (*m*).

"4. That when the King's grants are upon a valuable consideration they shall be construed favourably for the patentee for the honour of the King" (*n*).

Mr. Thomas' note to the *Case of Alton Woods* in Coke's Reports is a textual quotation of the foregoing passage containing the five rules from Bacon's Abridgment. But it is noteworthy that this author follows the later reading of the first rule, and states it thus. "That every false recital in a *part material* will not vitiate the grant if," &c. Moreover, to the fourth rule he adds the rule subjoined, in Bacon's Abridgment, concerning grants made upon a valuable consideration—the fourth of the subjoined rules—and to the fifth he adds the following new matter.

"In *Bozoun's Case*, 4 Co. Rep. 34, it was held that a clause of *non obstante* would supply the defect of a misrecital, and this doctrine was recognized in *A.-G. v. Hungate*, Hard. 231.

Lastly, Mr. Bridgman, and following him Mr. Webster, reproduces the passage as follows (*o*), his departures from the text followed by Bacon and Thomas being denoted by italic type.

"Respecting patents the following general rules were laid down by Lee, C. J. (M. T. 12 G. 2, A.D. 1738).

"1st. Every false recital in a thing *not material* will not vitiate the grant if the King's intention is *manifest and apparent*.

"2nd. If the King is not deceived in his grant by the false suggestion of the party but from his own mistake *upon the surmise and information of the party*, it shall not vitiate or avoid the grant (*p*).

(*l*) 21 E. 4, 49; 33 H. 7, 6; 36 H. 8, 37; 9 E. 4, 11, 12; Lane, 111; 2 Co. Rep. 54.

(*m*) Bulst. 4; Dyer, 350; 9 Co. Rep. 24; 10 Co. Rep. 4; *Whistler's Case*.

(*n*) 2 Inst. 446, 447; 6 Co. Rep.; *Sir Jno. Moline's Case*, 10 Co. Rep. 65.

(*o*) 1 W. P. C. 41.

(*p*) This reading is manifestly corrupt. The "surmise" cannot

- “3rd. Although the King is mistaken in point of law or matter of fact, if that is not part of the consideration of the grant it will not avoid it.
- “4th. Where the King grants *ex certâ scientiâ et mero motu*, those words occasion the grant to be taken in the most liberal and beneficial sense, according to the King’s intent and meaning expressed in his grant.”
- “5th. Although in some cases the general words of a grant may be qualified by the recital, yet if the King’s intent is plainly expressed in the *body of the grant*, the intent shall prevail and take place.”

Mr. Webster extracts in addition two paragraphs relating to *scire facias*, one referred to 4 Inst. 88, and the other to *Butler’s Case*, reported in 2 Vent. 344. But as these are textually, although not quite accurately, quoted from the two authorities named, it is not necessary to vouch the somewhat disputable authority of *Lee*, C.J., to authenticate them, and if the case of *Rex v. Mussary* be rightly identified with *The King* against *Massory*, it seems all but impossible that the law as to *scire facias* can have been laid down in that judgment. These two paragraphs should probably, therefore, be regarded as an interpolation, if indeed they were not intended by Mr. Bridgman as independent notes. They read as follows:—

“*A writ of scire facias to repeal letters patent lies in three cases:—1st. When the King doth grant by several letters patent one and the selfsame thing to several persons, the first patentee shall have a scire facias to repeal the second. 2nd. When the King doth grant a thing upon a*

possibly be surmise of the *party*, i.e., of the patentee, for he gives the information upon which the surmise is grounded. The mean-

ing unquestionably is as expressed by Bacon above, “his own surmises,” i.e., the King’s own surmises. See above, p. 272.

*false suggestion, he, prærogativâ regis, may by scire facias repeal his own grant. 3rd. When the King doth grant any thing which by law he cannot grant (q). 4 Inst. 88."*

*"Where a patent is granted to the prejudice of a subject, the King of right is to permit him upon his petition to use his name for the repeal of it. Butler's Case, H. 31 & 32 Car. 2; 2 Vent. 344."*

(q) Coke adds here:—"he *jure regio* (for advancement of justice and right) may have a *scire fac'* to repeal his own letters patents."

# INDEX.

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## ACCOUNT OF PROFITS,

order for, 243.

on what principles ordered, 129.

*See* DAMAGES.

## ACT OF PARLIAMENT,

grant by Act of Parliament saved, 238. *See also* STATUTES.

## ACTION,

infringement. *See* PATENT ACTION.

monopoly. *See* MONOPOLY ACTION.

threats. *See* THREATS ACTION.

## AD QUOD DAMNUM,

writ of, 227.

## ADVERTISEMENT,

threat by, 78, 81, 243.

## AGENCY,

agent's liability in threats action, 78.

particulars of agency in threats action, 97.

## AGGRIEVED PERSON,

in respect of monopoly, 39, 42, 237.

in respect of threats, 84, 94, 243.

corporation, 85.

rival patentee, 85.

*See also* GRIEVANCE.

## AID PRAYER, 60, 237.

compared with adding defendants, 61.

third party procedure, 61.

## ALIEN. *See* FOREIGNER.

## ALUM MINES, 240.

## APPRENTICESHIP. *See* TRADE—regulated by statute.

## ATTAINT,

writ of, 64, 238.

## AUTHORITY. *See* PRIVILEGE.

## BOARD OF TRADE,

power to compel patentee to grant licences, 98, 103, 242.

neglect of powers, 98.

petition to, 100, 248.

procedure on application, 104.

duty of Board of Trade, 103.

**BOOK OF BOUNTY,**

- reprint of, 161—192.
- identification of, 22, 23, 157, 232.
- history of, 7, 9.
- bibliography of, 159.
- origin of, 4, 6, 158.
- Sir E. Coke's notices of, 4, 7, 157, 232.
- Dr. S. R. Gardiner's observations on, 8, 158.
- leads to the Statute of Monopolies, 8, 21, 23, 235.
- incorporated in the Statute of Monopolies, 8, 23, 235.

**BOUNTY,**

- of James I., 5, 7.
- sources of (Book of Bounty, pp. 17—29), 179—192. *See* **ROYAL BOUNTY** and **BOOK OF BOUNTY**.

**BYE-LAWS.** *See* **TRADE**, rules.**CANTERBURY.** *See* **CUSTOM** of Canterbury.**CASE OF MONOPOLIES, 21.**

- report of, 199—231.
- reviewed, 193.
- authorities for, 193, 197.
  - Coke's report, 194, 197, 199, 201, 226.
  - Moore's report, 198, 204.
  - Noy's report, 198, 209.
- proceedings in, sketched, 196.
- judgment in, 226. *See* **TABLE OF CASES**.

**CERTAIN KNOWLEDGE, 275.**

- cures uncertainties, 111, 260, 273.

**CERTAINTY,**

- King's grant imports, 269.
- rule as to certainty, 273.

**CERTIFICATE,**

- of validity questioned in threats action, 93, 243.
- of reasonableness of particulars, 93, 243.

**CHANCELLOR,**

- origin of the title, 38.
- jurisdiction of, over patents, 37.

**CHANCERY.** *See* **COURT**, of Chancery.**CHANDLER,**

- town. *See* **CUSTOM** of Canterbury, 221.

**CHARTER,**

- defined, 30.
- compared with letters patent, 30.
- monopolies by, 24, 30, 236.
  - void, 230.
- corporations' charters saved in Statute of Monopolies, 239.
- City of London, 252.



CHARTER—*continued.*

- Drapers', 252, 255, 258.
- Fishmongers', 255.
- Goldsmiths', 258.
- Merchant Taylors', 259.
- Skinner's', 255, 258.
- Stationers', 122, 225, n. (i).

## CIRCULAR,

- threat by, 78, 243.
- instances of, 80, 82. *See* THREATS.

## CIVIL LAW,

- v.* Common Law of England, 5.
- doctrine of monopolies, 228. *See* Cowell's "Interpreter."

## CLOSE WRITS, 28.

CODEX JUSTINIANI. *See* CIVIL LAW.

## COKE, SIR EDWARD,

- on the Book of Bounty, 4, 7, 157, 232.
- Statute of Monopolies, 21, 25, 36.
- sole buying, selling, &c., 30, 33.
- Courts of Equity and Common Law, 37.
- penal statutes, 54.
- Darcy's monopoly, 232.
- his definition of monopoly, 26.
- report of the Case of Monopolies, 194, 197, 199.

## COMMISSIONS,

- creating monopolies, 24, 28.
- contrary to law, 36, 236.

## COMMODITIES,

- enhancing prices of, 227, 238.
- (Book of Bounty, p. 21), 183.
- deteriorated by monopolies, 228.

## COMMON INFORMER,

- pestilent common informers of Tudor-Stuart times, 69.
- penalty given to, 52. *See* PENAL STATUTE.

## COMMON LAW,

- monopolies to be tried by, 37, 236.
- doctrine concerning monopolies, 23, 226, 235, 236.
- (Book of Bounty, p. 13), 175.
- doctrine concerning threats, 12, 71.
- administered by Court of Chancery, 37.
- applied to construction of patents, 209, 210. *See* *Halsey v. Brotherhood*, *Wren v. Weild*.

## COMMON LAW COURTS,

- jurisdiction,
- in reference to monopolies, 9, 37, 237.
- patents, 10, 209.
- monopoly action, 56, 237. *See also* HIGH COURT.

## COMPOSITION,

- for penalty; grant of power of void, 24, 34, 236.

COMPTROLLER,  
defined, 244.

COMPULSORY LICENCE. *See* LICENCE BY PATENTEE.

CONDITION OF THE PEOPLE,  
how affected by monopolies, 228.

CONSIDERATION,  
for patent grant is entire, 108.  
in reference to validity, 272.  
to construction, 274.  
valuable for a patent for invention, 115, 250.

CONSOLIDATION OF ACTIONS. *See* JOINDER OF ACTIONS; PRACTICE.

CONSTRUCTION,  
of patents,  
by intention and interest of the Crown, 113, 119, 131, 207, 269,  
273.  
rule of favourable construction, 113.  
defeasance by, 114.  
according to common law, 209.  
of penal statutes, 53.  
of specification, 115, 131.

CONTEMPT,  
penalties of, under Star Chamber jurisdiction, 128.  
of Court, 80.

COPYRIGHT PATENTS, 130, 225, 240.  
form of, 256.

CORPORATION,  
liable in threats action, 76.  
aggrieved person, 85.  
disabled to hold monopoly, 39, 236.  
charters to corporations saved, 239.

COSTS,  
double in monopoly action, 57, 237.  
full and reasonable indemnity substituted, 57.  
saved by Judicature Act, 58.

COURT,  
defined, 244.  
of Chancery,  
is a Court of common law, 37, 56.  
jurisdiction of, 10, 37.  
of Common Law. *See* COMMON LAW COURTS.  
*See also* HIGH COURT.

COWELL, DR.,  
his Interpreter, 5.

CROWN,  
deceived, 111, 228, 272, 274.  
*See also* AID PRAYER; BOUNTY; GRANT BY THE CROWN; LETTERS  
PATENT; PREROGATIVE; PROCLAMATION; PROTECTION; RE-  
STRAINT; REVENUE; ROYAL LICENCE; *SCIRE FACIAS*; TRADE;  
TREASURE TROVE.

**CUSTOM,**

- compared with patent, 206.
- of Canterbury, 221.
- of Newcastle, 240.

**DAMAGES,**

- defined by patent, 129.
- given on general principles, 129.
- pleading to, 137, 145.
- in monopoly action,
  - special damages, 134, 140, 143
  - treble damages, 57, 237.
  - how ascertained, 57.
- in threats action,
  - general damages, 91, 134.
  - special damages,
    - how ascertained, 90.
    - remoteness of, 90.
    - lost profits, 91.
    - inquiry ordered, 91.

*See* ACCOUNT OF PROFITS.

**DAMNUM ABSQUE INJURIA,**

- instances of, 221.

**DATE OF STATUTE OF MONOPOLIES,**

- need not now be pleaded, 39, 140.

**DECEIVED IN GRANT. *See* CROWN.****DECLARATION,**

- by patentee, 107.
- of invalidity in threats action, 93.

**DEFENCE,**

- to monopoly action, 143.

**DEFINITIONS. *See* COMPTROLLER; COURT; INTERDICT; INVENTION; LAW OFFICER; PATENT; PATENTEE; PERSON; TREASURY.****DELIVERY UP. *See* FORFEITURE; SEIZURE OF GOODS.****DESTRUCTION OF INFRINGING GOODS,**

- contrary to doctrine of common law, 45.
- first instance of, 47.
- modern dicta, 50, 51.

*See also* FORFEITURE; SEIZURE OF GOODS.

**DICE,**

- false, action for use of, 222.

**DILIGENCE,**

- due diligence to defeat threats action, 94, 244.
- what is, 95.

*See also* THREATS ACTION.

**DISABILITY,**

- created by Statute of Monopolies, 10, 236.
- its bearing on modern patent law, 36, 37, 39.

# DISCONFORMITY OF COMPLETE TO PROVISIONAL SPECIFICATION,

a ground of invalidity *pro parte*, 109, 110.

DISCOVERY. *See* INSPECTION; PARTICULARS.

## DISPENSATION

with penal laws, 22, 33, 203, 235.

equivalent to royal licence, 230.

tending to monopoly, 33, 230, 263.

*See also* DISPENSING POWER.

“DISPENSE WITH OTHERS,” 24, 34, 236.

the idiom explained, 34.

## DISPENSING POWER,

in the hands of the King, 34, 231, 232.

exercised by *non obstante*, 203, n. (s), 233.

abolished by 1 W. & M. cap. 1., 231, n. (c).

in respect of *malum prohibitum*, 218.

none in respect of statute *pro bono publico*, 231.

in the hands of a subject, 34, 233.

monopolies by exercise of, 33, 230.

grants of dispensing power are contrary to law,

by Book of Bounty, p. 13..175.

by common law, 232.

by Statute of Monopolies, 33, 34, 236.

*See also* DISPENSATION.

DISQUIETED, 39, 43, 140, 237.

DISTURBED, 39, 43, 140, 237.

## ELIZABETH, QUEEN,

her policy, 1, 3.

her prerogative, 3.

## EQUITY,

Courts of. *See* COURT, of Chancery.

## ERROR,

writ of, 64, 238.

## ESPECIAL GRACE, 250.

how it affects the grant, 110, 113, 119, 269.

*See also* ROYAL BOUNTY.

## ESPECIAL LICENCE,

dispenses with laws, 121.

removes disability, 251.

defeats privileges, 119, 121, 252.

*See also* FULL POWER.

ESSOIN, 59, 237.

EVIDENCE. *See* INJUNCTION.

## EXCHEQUER,

privilege of, 62.

**FAIR,**

grant of, 208.  
Abbot of Westminster's fair, 222.

**FALSE SUGGESTION,**

grant made upon a, 107, 111, 269. *See also* RECITALS.

**FOREIGN TRADE,**

prerogative with reference to, 29, 206, 218, 263.

**FOREIGNER,**

patent rights extended over, 126.  
inhibited by the patent to John Gilbert, 254.  
Fishmongers' charter, 255.  
protected by charter against liberties of London, 252.

**FORFEITURE,**

none can grow by patent, 45, 50, 220.  
modern doctrine, 45, 48, 51.  
by statute, 46.  
grants of, when void—  
by common law, 232.  
by Statute of Monopolies, 24, 34, 236.  
when contrary to law by Book of Bounty, p. 13..175.  
by old form of patent, 254, 258.  
by trade charters, 258.  
rules as to granting upon conviction—  
of felons (Book of Bounty, p. 17), 179.  
of misdemeanants (*Ibid.*, p. 25), 187.  
of recusants (*Ibid.*, p. 27), 189.  
after outlawry (*Ibid.*, p. 19), 181.  
*See also* DESTRUCTION OF INFRINGING GOODS ; SEIZURE OF GOODS.

**FORM,**

of application to Board of Trade, 100, 248.  
of application for patent, 108.  
of injunction in threats action—  
interlocutory, 87.  
perpetual, 89.  
of licence by patentee, 131.  
of monopolies, 27.  
of patent, 107, 119, 123, 245, 249.  
of petition to Board of Trade, 100, 248.  
of plea of statutable right to licence, 153.  
of pleading in monopoly action, 52, 96, 139.  
of protection, 264.  
of statute. *See* STATUTE.  
of Statute of Monopolies, 21, 67.  
of fourth section, 24, 55.  
of saving clauses, 66.  
of threats, 78.  
instances, 80.

**"FULL POWER,"**

granted to remove disabilities, 121, 251. *See also* ESPECIAL LICENCE.

**FULLER,**

personal notice of, 194.  
his argument in the Case of Monopolies, 209—223.



## GENERAL ISSUE,

pleading in monopoly action, 54, 143.

## GILBERT'S PATENT (set out App. IV.), 249—262.

## GRANT BY THE CROWN,

monopoly by, 29.

how made, 28, 29.

in a patent, 115, 120, 127, 251, 253.

of favourable construction, 131, 259.

of bounty—King James' rules (Book of Bounty, p. 8), 170.

*See also* CROWN; HABENDUM; LETTERS PATENT.

GREAT SEAL. *See* SEAL.

## GRIEVANCE,

of monopoly, 11, 41, 207, 227, 237.

instances, 2, 26, 42, 102, 152, 215, 217, 220, 226.

defined, 42.

pleading, 140.

of threats, 11, 17, 75, 84, 94.

instances, 80.

*See also* HINDERED.

## HABENDUM, 256, 261.

function of, 116.

## HALSEY v. BROTHERHOOD,

doctrine of, 14, 71, 73, 75.

results in Patents Act, 1883..74.

*See* TABLE OF CASES; and *Wren v. Weild*.

## HASTINGS' PATENT,

forfeiture clause inoperative, 220.

## HIGH COURT,

Ch. Div., jurisdiction of, 38. *See also* COURT, of Chancery.

Q. B. D., jurisdiction in respect of C. P. of Lancaster, 38. *See also*

COMMON LAW COURTS; RULES.

## "HINDERED,"

by claim of monopoly, 39, 237.

instances, 40.

hindrance defined, 40.

pleaded, 140.

*See also* GRIEVANCE.

## HOASTMEN OF NEWCASTLE, 240.

## HUMPHREY'S PATENT,

void by common law, 220.

## IMPARLANCE, 64, 237.

IMPOSITION. *See* PREROGATIVE of taxation.

## INFRINGEMENT,

- is a tort, 117.
- by aliens, 126.
  - occasional user, 127.
  - colourable imitation, 128.
- an issue in a threats action, 94.

## INHIBITION, 35.

- of the modern patent, 127.
- form in Gilbert's patent, 254.

## INJUNCTION,

- to restrain trade, 24, 35, 63, 205, 226, 236.
- to restrain monopoly—
  - doctrine of *Halsey v. Brotherhood*, 14, 16, 72.
  - under Statute of Monopolies, 18, 133.
- to restrain monopoly action, 63, 237.
- to restrain infringement, 152.
- to prevent continuance of mischief, 80, 85, 244.
- enforceable by attachment, 90.
- interlocutory, to restrain threats—
  - on *ex parte* application, 85.
  - applied for in vacation, 88.
    - in patent action, 88.
  - prejudiced by delay, 88.
  - granting is discretionary, 74, 86.
  - granted on weight of evidence, 87.
  - balance of convenience, 86.
  - evidence to support application, 86, 87.
  - form of, 87.
- perpetual, to restrain threats—
  - contemplated by sect. 32 of Pat. Act, 88.
  - when granted, 85, 89, 243.
  - counterclaimed in patent action, 89, 90.
  - not discretionary, 89.
  - not prejudiced by delay, 89.
  - form of, 89.
- interim injunction, 88.
- See also* RESTRAINT.

## INSPECTION,

- order for, 243.

## INTERDICT,

- defined, 244.

INTERPRETATION. *See* CONSTRUCTION.

## INTERPRETER, THE, 5.

## INVENTION,

- defined, 244.
- use of, prevented by patentee, 102, 152, 242.

## ISSUES,

- in monopoly action, 18, 39, 140.
- in threats action, 14, 91, 136.
- shaping, 145.
- separating for trial, 97, 146.
- See also* PRACTICE.

## JAMES I., KING,

- his policy, 3, 4.
- his prerogative, 7, 8.
- publishes the Book of Bounty, 6.
- his proclamations, 6.
- his rules concerning bounty, 163—191.

*See* BOOK OF BOUNTY, *passim*.

## JOINDER OF ACTIONS,

- doctrine of, 137.
- of monopoly and threats actions, 135, 139.

## KING,

- can do no wrong, 218, 227, n. (q).
- his grant—
  - how construed, 113, 119, 131, 269, 273.
  - how made, 27, 132, 244.

*See also* CROWN and headings there enumerated.

## LACHES,

- prejudice interlocutory injunction, 88.
- patentee's, 111, 113.

## LAW OFFICER,

- defined, 244.

## LEAVE TO AMEND SPECIFICATION,

- in threats action, 97.
- in trade mark action, 97.

LEGAL PROCEEDINGS. *See* BOARD OF TRADE; PATENT ACTION;  
MONOPOLY ACTION; THREATS ACTION.

## LETTER,

- of protection, 265.
- threats by solicitor's letter, 81.
- letter to customer, 81, 82.
- letter in answer to inquiry, 82.

## LETTERS PATENT,

- defined, 30.
- form of, 30.
- modern, 107, 244, 245.
- old, 249.
- contents of, 107—132.
- gives remedies as well as rights, 118.
- warrants the grant, 119.
- epitomised, 119.
- the title of the invention, 108.
- the inhibition, 127.
- the defeasance, 129, 130.
- phraseology, 132.
- validity of,
  - under Statute of Monopolies, 24, 30, 66, 68, 236, 238.
  - at common law, 227, 235.
  - in terms of the patent, 129.
  - may stand *pro parte*, 109.

LETTERS PATENT—*continued.*

- defeasance of, 129.
- cannot occasion a forfeiture, 45, 50, 220.
  - change the law, 207.
  - create a new burden, 207, 227.
  - or a grievance, 207, 227.
- source of patent right, 106.

*See also* GRANT BY THE CROWN.

LICENCE FROM THE CROWN. *See* ROYAL LICENCE.

## LICENCE BY PATENTEE,

- forms of, 131.
- to be in writing, 128.
  - or otherwise, 131.
- compulsory, 19, 98, 242, 247.
  - proceedings to obtain, 100, 247.
- statutable right to, 99, 151.

*See also* BOARD OF TRADE.

## LICENSEES,

- included in the patent grant, 123.
- injured by threats, 135.

*See also* LICENCE BY PATENTEE.

## MAGISTRATES,

- to assist patentee, 259.

## MAGNA CARTA,

- avoids forfeiture of goods by patent, 45.
- freedom of trade under, 206, 230.

## “MAKE, USE, AND EXERCISE,” 124.

## MAKING,

- sole, 24, 26, 30, 124, 219, 226, 228, 236, 245, 251.

## MALICE,

- doctrine of, in *Wren v. Weild* and *Halsey v. Brotherhood*, 13—15, 72, 73.

## MALUM IN SE, 203.

- monopoly is, 36.
- cannot be dispensed with, 215.

## MALUM PROHIBITUM, 203.

- dispensing with, 215, 218, 223.

## MANDAMUS,

- to enforce order of Board of Trade, 104.

## MATTHEY'S PATENT, 220.

## MERCHANTS,

- their liberty to trade, 206, 218, 230.

## “MERE MOTION,” 112, 273.

- origin of the phrase, 112.

## MONOPOLIES,

definition of. *See* MONOPOLY.

Case of. *See* CASE OF MONOPOLIES.

Statute of. *See* STATUTES, 1624 (21 Ja. 1, c. 3).

contrary to common law, 23, 26 (Book of Bounty, p. 13), 175, 205, 226, 235.

to statute, 24, 25, 230, 232, 236.

to the civil law, 228.

created by,

royal grant, 24, 28.

private contract, 27, 205.

mischievous effects of,

on trade and industry, 2, 11, 102, 215, 227, 228.

on prices, 130, 207, 215, 227.

on quality of goods, 228.

on condition of people, 228.

to be tried by common law, 9, 236.

subject-matter of, 31—33.

popular feeling about, 2, 6.

things tending to, 36.

*See also* MONOPOLY.

## MONOPOLY,

the word defined, 25, 31, 67, 68, 141, 218, 227.

in *Case of John the Dyer*, 26, 205, 217.

in *Davenant v. Hurd*, 26, 206.

in *Ipswich Taylors' Case*, 26.

in the Statute of Monopolies, 67.

in *Boulton v. Bull*, 27.

by Sir Edward Coke, 26.

by Flemming, S.-G., 218.

how used,

in Book of Bounty, 26, 175.

in the Statute of Monopolies, 8, 25, 33, 67, 68.

in the Case of Monopolies, 227.

*See also* MONOPOLIES.

## MONOPOLY ACTION, 52—65, 139—151.

an untried remedy, 12.

provisions of sect. 4 of Statute of Monopolies, 10, 39—65, 237.

illustrated by *Wren v. Weild*, 12.

compared with sect. 32 of Patents Act, 18, 134.

the grievance, 10, 25, 33, 140, 237.

the person aggrieved, 39, 42, 237.

the *forum*, 56, 237.

the party defendant, 57, 237.

the plaintiff's case, 139.

the defence, 143.

the issues, 18, 39, 140.

procedure, 58, 61, 135, 145, 237.

relief,

damages, 18, 134, 140, 143.

treble damages, 57, 237.

injunction, 18, 133.

double costs, 57, 237.

*See also* COSTS; DAMAGES; "DISQUIETED;" "DISTURBED;" GENERAL ISSUE; GRIEVANCE; "HINDERED;" INJUNCTION; ISSUES; MONOPOLY; PARTICULARS; PENAL STATUTES; PLEADING; PRACTICE; PRIVILEGE; PROCEDURE; RIGHT TO BEGIN; STATEMENT OF CLAIM; THREATS ACTION.



**NON OBSTANTE,**

effect of *non obstante* clause, 203, n. (s).

*See also* DISPENSING POWER.

OBSTRUCTIVE PATENTS, 19, 99, 102, 242.

OPPRESSION BY PATENTEES. *See* MONOPOLIES.

**OUSTER,**

of the 32nd section of Patent Act, 75, 94.

*See also* THREATS ACTION.

**PALATINE COURT,**

jurisdiction in monopoly action, 57.

in patent action, 38.

transferred to High Court, 38.

**PARTICULARS,**

in monopoly action, 145.

in threats action,

of agent, 97.

of breaches, 92, 243.

of objections, 92, 243.

certificate of, 93.

PASTIME, 214, 222.

**PATENT,**

defined, 244.

compared with custom, 206.

not worked within the realm, 242.

for copyright, 240, 256.

for ordnance, 246.

for philosopher's stone, 225.

for saltpetre, 208, 246.

for smalt, 241, 251.

Baker's patent (iron ore), 241.

Berkshire (kilns), 262.

Bowes, (cards), 200.

Darcy's (cards), 200.

Dudley's (iron ore), 242, 256.

Gilbert's—set out—(dredger-pump), 249—262.

Hastings' (frisadoes), 220.

Humphrey's (sive), 220.

Mansell's (glass), 251.

Mason's (copyright), 256.

Matthey's (knives), 220.

Molle's (brocage), 205.

Peechee's (sweet wines), 206, 231.

Speed's (copyright), 256.

*See also* GRANT BY THE CROWN; LETTERS PATENT; PATENT ACTION;  
PATENT ACT; PATENT GRANT; PRIOR GRANT; RULES.

PATENT ACT. *See* STATUTES (46 & 47 Vict. c. 57).

**PATENT ACTION,**

defeats threats action, 85, 89, 94.

but must be honest, 94.

must test validity, 94.

or infringement, 94.

**PATENT ACTION**—*continued.*

defeats threats action—*continued.*

must be prosecuted with due diligence, 95.

comparative diligence, 96.

need not be successful, 95.

brought by way of counterclaim, 97.

brought by third party, does not avail to oust the 32nd section, 95.

*See also* THREATS ACTION.

**PATENT GRANT,**

nature of, 107, 120, 123.

for new inventions,

Book of Bounty (p. 21), 183.

Statute of Monopolies, 65, 238.

to make, use, &c., 123.

terms of, 115, 126, 253.

as to geographical limits, 33, 126.

*ultra vires* to be repealed, 276.

prejudicial or inconvenient, 129.

when void *pro parte*, 109.

how to be construed, 123, 207.

consideration for, 108—110.

*See also* GRANT BY THE CROWN; LETTERS PATENT; PATENT; PRIOR GRANT.

**PATENT RULES, 1890.** *See* RULES.**PATENTEE,**

defined,

by patent, 108, 245.

by Patent Act, 1843..244.

claiming to be patentee, 77, 140.

a privileged person, 122, 124, 126, 251, 254.

his profit and advantage, 125, 256.

his right to *sci. fa.* to repeal later patent, 118.

**PENAL STATUTES,**

case of, reported, 232.

bearing on Statute of Monopolies, 54.

Pat. Act, s. 32..76.

definition of, 52.

construction of, 53, 54.

benefit of, not grantable, 24, 34 (Book of Bounty, p. 13), 175, 236.

action on,

pleading general issue, 54, 143.

*See also* REMEDIAL STATUTES; DISPENSATION.

**PENALTY,**

composition for, 24, 34 (Book of Bounty, p. 28), 190, 236.

grant of, before conviction, 24, 34 (Book of Bounty, p. 26), 186, 232, 234, 236.

**PERSON,**

defined, 244.

**PERSON AGGRIEVED.** *See* GRIEVANCE.**PERSONAL PRIVILEGE,**

of Chancery, 62.

King's Bench, 62.

Common Pleas, 62.

**PERSONAL PRIVILEGE**—*continued*.

of Exchequer, 63, 257.

Parliament, 62.

solicitor, 63.

ousted by Statute of Monopolies, 58.

**PETITION,**

to the Crown, patentee's, 108, 245, 250.

to Board of Trade under sect. 22..100.

form of, 100, 248.

substance of, 101.

proceedings upon, 100, 104, 247.

hearing of, 105.

**PHILOSOPHER'S STONE,**

patent for, 202, 225.

**PLEA,**

of statutable right to licence, form of, 153.

**PLEADING,**

a statute, 52, 96, 140, 141.

the general issue, 54, 143.

statutable right to licence, 151, 153.

to damages, 137, 145.

specially to monopoly action, 144.

*See also* PRACTICE.

**PRACTICE,**

generally,

certificate of validity, 93.

pleading a statute, 52, 96, 140, 141.

trial of separate issues, 97, 146.

agreement to save costs, 97.

joinder of actions, 97, 135, 137, 139.

setting down together, 97.

delivery of particulars,

*See* PARTICULARS.

in monopoly action,

to be tried by common law, 56, 237.

joinder with threats action, 135, 138.

statement of claim, 139.

defence, 143.

pleading to damages, 137, 145.

particulars, 145.

trial of issues, 146.

conduct of proceedings, 64, 150, 237.

right to begin, 137, 144.

treble damages, 57, 237.

injunction, 133.

double costs, 57, 58, 237.

in patent action,

jurisdiction, 9, 38, 236.

due diligence, 95.

commencing by counterclaim, 97.

injunction, 152.

plea of statutable right to licence, 151, 153.

inspection, 243.

particulars, 243.

PRACTICE—*continued.*

- in threats action,
  - joinder with monopoly action, 135, 138.
  - issue of validity, 91, 92.
  - issue of threat or no threat, 97.
  - severance of issues, 97, 146.
  - plea of patent action, 94.
  - by third party, 95.
  - particulars, 92, 97.
  - See also* PARTICULARS.
  - right to begin, 92, 136, 243.
  - amendment of specification, 97.
  - injunction,
    - interlocutory, 74, 85.
    - application in patent action, 88.
    - in Vacation, 88.
    - perpetual, 85, 88, 243.
    - See also* INJUNCTION.
  - damages, 90, 134.
  - See also* DAMAGES.
- in application to Board of Trade,
  - form of application, 248.
  - submission of evidence, 100, 104, 247.
  - hearing, 105.
  - mandamus, 104.

PRÆMUNIRE, 64, 65, 238.

## PREJUDICIAL GRANT, 211.

- is void, 227.
- ground for *sci. fa.*, 276.
- jurisdiction of Privy Council, 129.
- of Board of Trade, 102.

## PREROGATIVE,

- abuse of, 1, 3.
- difficulty of redressing, 8.
- grounded in law, 205, 209.
- limitation of, 210.
- to regulate administration of justice, 40, 206, 223.
- to grant exemptions, 203, 204, 223.
- to grant protection, 59, 223.
- in respect of trade, 117, 203.
  - of foreign trade, 206, 218, 224.
  - of taxation, 225.
  - of corporate liberties, 225.
  - of granting a fair, 208.
  - of matters of recreation, 202, 225, 229, 230.
  - See* DISPENSING POWER.

## PRICES,

- enhanced by monopolies, 215, 227.

PRINTING. *See* COPYRIGHT PATENTS.

## PRIOR GRANT,

- saving of, in patent, 261.

**PRIVILEGE,**

- granted by patent, 122, 206.
- compared with chartered privileges, 122, 255.
- of trade fellowships, 121, 124, 252, 255.
- doctrine of, in *Wren v. Weild*, 14, 39.
- not available as defence to threats action, 76, 79.
- personal, 62, 63, 257.
- ousted by Statute of Monopolies, 58.
- See also* PERSONAL PRIVILEGE.

**PRIVY COUNCIL,**

- jurisdiction,
  - ousted by Statute of Monopolies, 37, 236.
  - stipulated for in patent, 129, 260.
- illustrations of its exercise, 44, 264—267.

**PROCEDURE,**

- chapter on, 133—154.
- in action on statute, 231.
- in monopoly action, 18, 52—65, 133—151, 237.
- in threats action, 18, 85—97, 134—138, 243.
- application to Board of Trade, 19, 100—105, 242, 247.
- See also* FORM; HIGH COURT; INJUNCTION; PRACTICE; PARTICULARS; PLEADING; and above headings.

**PROCLAMATION,**

- in furtherance of monopoly,
  - avoided by Statute of Monopolies, 24, 34, 236.
- in aid of Earl of Berks' patent, 262.
- King James', collected and published, 6.

**PROTECTION,**

- in aid of monopoly disallowed, 59, 237.
- prerogative of, 59, 223.
- warrant of; set out, 264.
- letter of; set out, 265.

**RECITALS,**

- in letters patent,
  - bind patentee, not Crown, 107.
  - patentee responsible for, 111, 112.
  - effect of false recital, 271, 273, 274.
  - qualifying grant, 114, 273.
  - bearing on construction, 113, 115, 273.

**REMEDIAL STATUTES,**

- defined, 52.
- construction of, 54.
- See also* PENAL STATUTES.

**RENT,**

- reserved by patent, 130, 257, 261.

**REQUIREMENTS OF THE PUBLIC,**

- in respect of patented invention, 102, 130, 242, 246.



**RESTRAINT,**

- tending to monopoly,
  - disallowed by statute, 24, 35, 236.
  - by common law, 205—226.
- by the Crown or officer of the Crown, 35, 63.
- by subjects, 35, 206.

*See also* INJUNCTION.

**REVENUES,**

- reserved to Crown (Book of Bounty, p. 14), 176.

**REVOCATION OF PATENT, 102.**

- under Patent Act, 1883..242.
- by Privy Council, 129, 246. *See also* SCIRE FACIAS.

**RIGHT TO BEGIN,**

- in monopoly action, 137, 144, 146, 149.
- in threats action, 92, 136, 243. *See also* ISSUES ; PRACTICE.

**ROMAN LAW. *See* CIVIL LAW.****ROYAL BOUNTY,**

- See* Book of Bounty, *passim*, 161—192.
- sources of, 5, 257.
- (Book of Bounty, pp. 17—29), 179—191.
- theoretical source of patent, 107, 110, 269.

**ROYAL LICENCE,**

- tending to monopoly, void, 24, 29, 236.
- to carry on foreign trade, 29, 203, 263.
- go beyond the seas, 224.
- excuse a nuisance, 30.
- answer a privilege, 29, 251.
- follow a handicraft, 29.
- infringe the law, 33, 34, 121. *See also* ESPECIAL LICENCE ; PRE-ROGATIVE.

**RULES,**

- of Supreme Court,
  - O. XVI. r. 11 (Parties), 61.
  - r. 48 (Third party), 61.
  - O. XVIII. r. 1 (Causes), 136.
  - O. XIX. r. 7 (Particulars), 92.
  - r. 16 (Departure), 92.
  - O. XXI. r. 4 (Damages), 145.
  - r. 19 (Pleading statute), 142.
  - r. 20 (Abatement), 60, 63.
  - O. XXV. r. 2 (Point of law), 145.
  - O. XXXVI. r. 8 (Separate trial), 146.
- of Patent Office,
  - as to proceedings at Board of Trade, 100, 101, 104, 247.
  - as to application for patent, 108.

**SANCTUARY,**

- for debt, 223, 224.

**SAVING,**

- in Statute of Monopolies,
  - of patents for new inventions, 65—69, 238.
  - for copyrights, 240, 256.
- of subsisting patents, 70, 239—242.
- of charters, 239.

SAVING—*continued.*

- in patent,
  - of prior grant, 261.
  - of subsisting trades, 129, 261.

## SCIRE FACIAS, 38.

- when it lay, 275.
- Crown's right to, 118.
- patentee's right to, 118.
- when conceded to a subject, 276.
- abolished, 242. *See also* REVOCATION OF PATENT.

## SEAL,

- great seal,
  - indispensable to grant by Crown, 27, 29.
  - King James' rules concerning (Book of Bounty, p. 5), 167.
- of Patent Office,
  - substituted for great seal, 27, 132, 244. *See also* GRANT BY THE CROWN.

## SEARCH,

- power of, in old patents, 43, 257.
- in trade charter, 258. *See also* SEIZURE OF GOODS.

## SEIZURE OF GOODS,

- penalised by Statute of Monopolies, 45, 237.
- modern doctrine and practice, 47, 50, 51.
- power granted,
  - by patent, 258.
  - by trade charter, 258. *See also* DESTRUCTION OF INFRINGING GOODS—FORFEITURE.

SELLING. *See* SOLE PRIVILEGE TO SELL.

## SETTING DOWN TOGETHER FOR TRIAL, 97.

SLANDER OF TITLE. *See* *HALSEY v. BROTHERHOOD* and *WREN v. WEILD*.

## SOLE,

- privilege, &c., 26, 32, 122, 141, 245, 251.
  - to buy, 24, 26, 30, 227, 236.
  - to sell, 24, 26, 30, 123, 125, 227, 236, 253, 255.
  - to make, 24, 30, 116, 124, 219, 226, 228, 236, 245, 251.
  - to work, 24, 30, 116, 236.
  - to use, 24, 30, 102, 124, 153, 236, 245, 253, 255.
  - to exercise, 123, 124, 245.

SOLICITOR'S PRIVILEGE, 63. *See also* PERSONAL PRIVILEGE.

## SPECIFICATION,

- recited in patent, 109, 245.
- doctrine of disconformity, 110.
- construction of, 115.

## STAR CHAMBER,

- jurisdiction in cases of monopoly, 128, 219.
- ousted by Statute of Monopolies, 37, 236.

## STATE OF THE LAW,

- as to monopolies reviewed, 1—20.

## STATEMENT OF CLAIM,

in monopoly action, 39, 52, 139.

## STATUTES,

St. Westr. Sec. c. 31 (error), 64.

Magna Carta, 25 Edw. I., c. 18 (free trade), 230.

c. 29 (forfeiture), 45.

c. 29 (prerogative), 213.

c. 30 (prerogative), 206.

1328. 2 Edw. III., c. 2 (prerogative), 209.

1335. 9 Edw. III., c. 1 (free trade), 218, 224, 230.

1340. 14 Edw. III., c. 15 (prerogative), 209.

1352. 25 Edw. III., c. 2 (free trade), 218, 230.

(dispensation), 218.

1353. 27 Edw. III., c. 11 (free trade), 230.

1363. 37 Edw. III., c. 1 (free trade), 230.

1388. 11 Ric. II., c. 9 (impositions), 225.

1388. 12 Ric. II., c. 6 (pastime), 214, 222.

(prerogative), 230.

1393. 16 Ric. II., c. 5 (præmunire), 64, 65, 238.

1399. 1 Hen. IV., c. 6 (patents), 111.

c. 9 (pastimes), 222.

1401. 2 Hen. IV., c. 2 (patents), 111.

1402. 4 Hen. IV., c. 4 (patents), 112.

1410. 11 Hen. IV., c. 4 (pastimes), 214.

(prerogative), 230.

1463. 3 Edw. IV., c. 4 (trade), 203, 207, 229.

(procedure), 231.

c. 6 (trade), 215.

1478. 17 Edw. IV., c. 3 (prerogative), 230.

1484. 1 Ric. III., c. 12 (trade), 215, 229.

1495. 11 Hen. VII., c. 17 (prerogative), 229.

1504. 19 Hen. VII., c. 21 (injunction), 63.

1534. 26 Hen. VIII., c. 10 (prerogative), 218.

1542. 33 Hen. VIII., c. 9 (pastimes), 214, 222.

(prerogative), 230.

1563. 5 Eliz., c. 4, s. 24 (apprenticeship), 29, 63, 215, 219, 230.

1581. 23 Eliz., c. 10 (prerogative), 229.

1587. 29 Eliz., c. 4 (grievance), 41.

1589. 31 Eliz., c. 1, s. 1 (hindrance), 40.

c. 5 (disquiet), 44.

c. 11 (disturbance), 43.

1604. 1 Ja. I., c. 6 (injunction), 63.

1606. 3 Ja. I., c. 13 (prerogative), 229.

1610. 7 Ja. I., c. 5 (double costs), 58.

1624. 21 Ja. I., c. 2 (quiet), 44.

(Monopolies) c. 3. .8, 21—70, 235—242.

preamble (Book of Bounty), 7, 157.

(commentary), 22.

(appendix), 235.

s. 1 (commentary), 24—37.

(appendix), 236.

s. 2 (commentary), 37, 38.

(appendix), 236.

s. 3 (commentary), 39.

(appendix), 236.

s. 4 (commentary), 39—65.

(settlement of text), 12.

(pleading), 140.

STATUTES—*continued.*

1624. 21 Ja. I., c. 3, s. 4 (procedure), 150.  
 (Monopolies—*continued.*) (appendix), 237. *See* MONOPOLY ACTION.  
     s. 5 (appendix), 238.  
     s. 6 (commentary), 65—69.  
         (sole privilege), 116, 124.  
         (monopoly), 141.  
         (appendix), 238.  
     s. 7 (saving), 66, 69.  
         (appendix), 239.  
     s. 8 (commentary), 69, 70.  
         (appendix), 239.  
     ss. 9—14 (commentary), 70.  
         (appendix), 239, 242.  
     c. 4 (penal statutes), 54, 143.  
     c. 5 (quiet), 44.  
     c. 8 (grievance), 41.  
     c. 16 (quiet), 44.  
     c. 17 (hindrance), 40.  
     c. 25 (monopoly), 31.
1627. 3 Car. I., c. 1 (quiet), 44.
1640. 16 Car. I., c. 1, s. 1 (grievance), 41.
1688. 1 Will. & Mar., c. 1 (dispensing power), 231, n. (c).
1802. 42 Geo. III., c. 56 (aid prayer), 62.
1825. 6 Geo. IV., c. 50, s. 60 (attaint), 64.
1832. 2 Will. IV., c. 39, s. 11 (imparlance), 64.
1835. 5 & 6 Will. IV., c. 76, s. 133 (double costs), 58.
1842. 5 & 6 Vict., c. 97, s. 2 (double costs), 57, 58.  
     c. 100 (forfeiture), 46.
1852. 15 & 16 Vict., c. 83, s. 6 (construction), 132.  
     Schedule (patent grant), 120, 254.  
         (form of patent), 123.  
         (sole selling), 124.
1861. 24 & 25 Vict., c. 96, s. 3 (penal statutes), 53.
1863. 26 & 27 Vict., c. 125 (repeal), 12, 65, 238.  
     (mere motion), 113.
1868. 32 & 33 Vict., c. 71, s. 71 (grievance), 41.
1872. 35 & 36 Vict., c. 94, s. 52 (grievance), 41.  
     c. 98 (mere motion), 113.
1873. 36 & 37 Vict., c. 66, s. 16 (1) (Chancery), 37.  
 (J.A.) (9) (Palatine Court), 38, 57.  
     s. 24 (5) (restraint), 35, 63.  
     s. 25 (8) (injunction), 133.  
     s. 34 (3) (Chancery), 38, 56.
1881. 44 & 45 Vict., c. 58, s. 144 (essoin), 59.
1883. 46 & 47 Vict., c. 57, s. 5 (4) (specification), 109.  
 (Pat. A.) s. 11 (person interested), 101.  
     s. 12 (2) (seal), 27, 132.  
     s. 18 (amendment), 97.  
     s. 22 (comp. lic.), 19, 151, 153.  
         (commentary), 98—105.  
         (appendix), 242.  
     s. 26 (procedure), 149.  
         (appendix), 242.  
     s. 29 (procedure), 93.  
         (appendix), 243.  
     s. 30 (appendix), 243.  
     s. 31 (appendix), 93, 243.

STATUTES—*continued.*

1883. 46 & 47 Vict., c. 57, s. 32 (threats), 12, 16, 76, 78, 135, 145.  
 (Pat. A.—*continued.*) (commentary), 71—97.  
 (joinder), 138.  
 (appendix), 243.  
 s. 33 (form of patent), 107.  
 (appendix), 244.  
 s. 46 (patentee), 77.  
 (appendix), 244.  
 s. 84 (appendix), 244.  
 s. 90 (grievance), 42.  
 s. 101 (rules), 247.  
 s. 113 (repeal), 239, 240.  
 s. 117 (appendix), 244.  
 Sch., Form D. (commentary), 106—132.  
 (appendix), 245.  
 Schedule 3 (repeal), 239, 240.
1884. 48 & 49 Vict., c. 63, s. 2 (declaration), 107.
1887. 50 & 51 Vict., c. 59 (repeal), 112.
1888. 51 Vict., c. 3 (Statute of Monopolies, s. 2), 236.  
 (Statute of Monopolies, s. 4), 12, 237.  
 (Statute of Monopolies, s. 6), 238.  
 (Statute of Monopolies, ss. 7, 9), 239.
1890. 53 & 54 Vict., c. 44, s. 5 (double costs), 58.

SUGGESTION. *See* FALSE SUGGESTION.

## SYNOPSIS,

- of Statute of Monopolies, 21, 68.  
 first section of, 23, 24.  
 of patent, 119.

## TAVERNS,

- licensing of, 241.

THIRD PARTY PROCEDURE, 61. *See also* PRACTICE ; PROCEDURE.

## THREATS,

- of patent action, &c., 11, 39, 243.  
 mischief of, 75, 76, n. (r), 78.  
 in respect of rubbishy patent, 78.  
 addressed to third person, 79, 84.  
 damaging a licensee, 135.  
 what are, 78, 84.  
 instances, 80—83.  
 by agent, 77, 78.  
 circular, 75, 78.  
 letter, 81.  
 advertisement, 75, 81.  
 oral threats, 78, 82.  
 constructive, 79.  
 equivocal threats, 78.  
 general warnings, 78, 79.  
 vague threats, 84.  
 repeated threats, 91.  
 what is not a threat, 83.  
 issue of threat or no threat, 97.



**THREATS ACTION, 71—97.**

- origin of the term, 76.
- raised by counterclaim, 89.
- dismissed as vexatious, 89.
- agent's liability to, 78.
- when patent invalid, 93.
- aggrieved person in, 84, 94, 243.
- party defendant, 85.
- defeated by patent action, 94, 95.
- issues in, 91.
- procedure in, 92, 96, 97, 136.
- relief,
  - injunction, 85—90.
  - damages, 90, 91.
  - declaration of invalidity, 93.
  - certificate of validity questioned, &c., 93.

**TOLERATION. See DISPENSING POWER (grants of).****TRADE,**

- free by common law, 216, 218, 226.
- by statute law, 218, 230.
- regulated by statute, 29, 203, 207, n. (a), 215, 229, 230.
- by Royal licence, 117, 121, 206, 208, 224, 255.
- by Privy Council, 63, 263.
- fettered by trading privileges, 121, 124, 251, 258.
- rules of Merchant Taylors, 226.
- charters saved in Statute of Monopolies, 239.
- See also* CHARTER; COMMON LAW; CUSTOM; ESPECIAL LICENCE;  
FULL POWER; INJUNCTION; MAGNA CHARTA; MERCHANTS;  
MONOPOLIES; PREROGATIVE; PRIVILEGE; RESTRAINT; SOLE  
PRIVILEGE.

**TRADE MARK ACTION, 97.****TREASURE TROVE,**

- granted, 28, 261.

**TREASURY,**

- defined, 244.

**UNITED KINGDOM, 33, 125, 126.****USE OF INVENTION,**

- prevented by patentee, 103, 152, 242.
- See also* LICENCE BY PATENTEE.

**USING,**

- sole privilege of, 19, 24, 26, 30, 102, 124, 153, 236, 245, 253, 255.
- See also* SOLE PRIVILEGE.

**VALIDITY,**

- of patent,
  - at common law, 227, 235.
  - by statute, 24, 30, 66, 68, 236, 238.
  - in terms of grant, 129.
  - Flemming's four tests, 207.
  - Fuller's criterion, 219.
  - to be tried by common law, 9, 37, 236.

**VALIDITY**—*continued.*of patent—*continued.*

when in issue,

doctrine of *Wren v. Weild*, 14, 71.*Halsey v. Brotherhood*, 15.

in monopoly action, 18, 139.

in threats action, 91, 94.

separate trial of, 146.

certificate of, 93, 243.

*See also* MONOPOLIES; PATENT GRANT; PREJUDICIAL GRANT.**VALUABLE CONSIDERATION**, 110, 115, 274.**VEND**,

patentee's privilege of vending, 123, 125, 251, 253, 256.

chartered privilege of vending, 125, 255.

*See also* SOLE PRIVILEGE TO SELL.**WAGER OF LAW**, 60, 237.**WARNING**,

of intended action, 13.

general warning, 78, 79.

*See* THREATS.**WARRANT**,

of assistance, 24, 36, 236.

of protection, 59, 264.

for dispensation, 34, 232, 236.

to justices, 239.

King James' rules as to making (*Book of Bounty*, p. 6), 168.**WARRANTIA DIEI**, 218, 223.**WORDS.** *See* DEFINITIONS.**WORKING AN INVENTION**, 102, 153.

privilege of, 124.

sole privilege of, 19, 24, 26, 30, 236, 245.

*See also* SOLE PRIVILEGE.**WREN v. WEILD**,

pleadings in, 12.

doctrine of, 13, 15, 71, 72, 75.

*See* TABLE OF CASES; and *Halsey v. Brotherhood*.**WRIT**,

of attain, 64, 238.

of error, 64, 238.

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
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